

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 421

**LOUISIANA PUBLIC SERVICE COMMISSION, HUEY P.
LONG, CHAIRMAN; SHELBY TAYLOR AND FRANCIS
WILLIAMS, MEMBERS THEREOF, APPELLANTS,**

vs.

**MORGAN'S LOUISIANA & TEXAS RAILROAD &
STEAMSHIP COMPANY**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA**

FILED JULY 9, 1923

(29,731)

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STEAMSHIP COMPANY

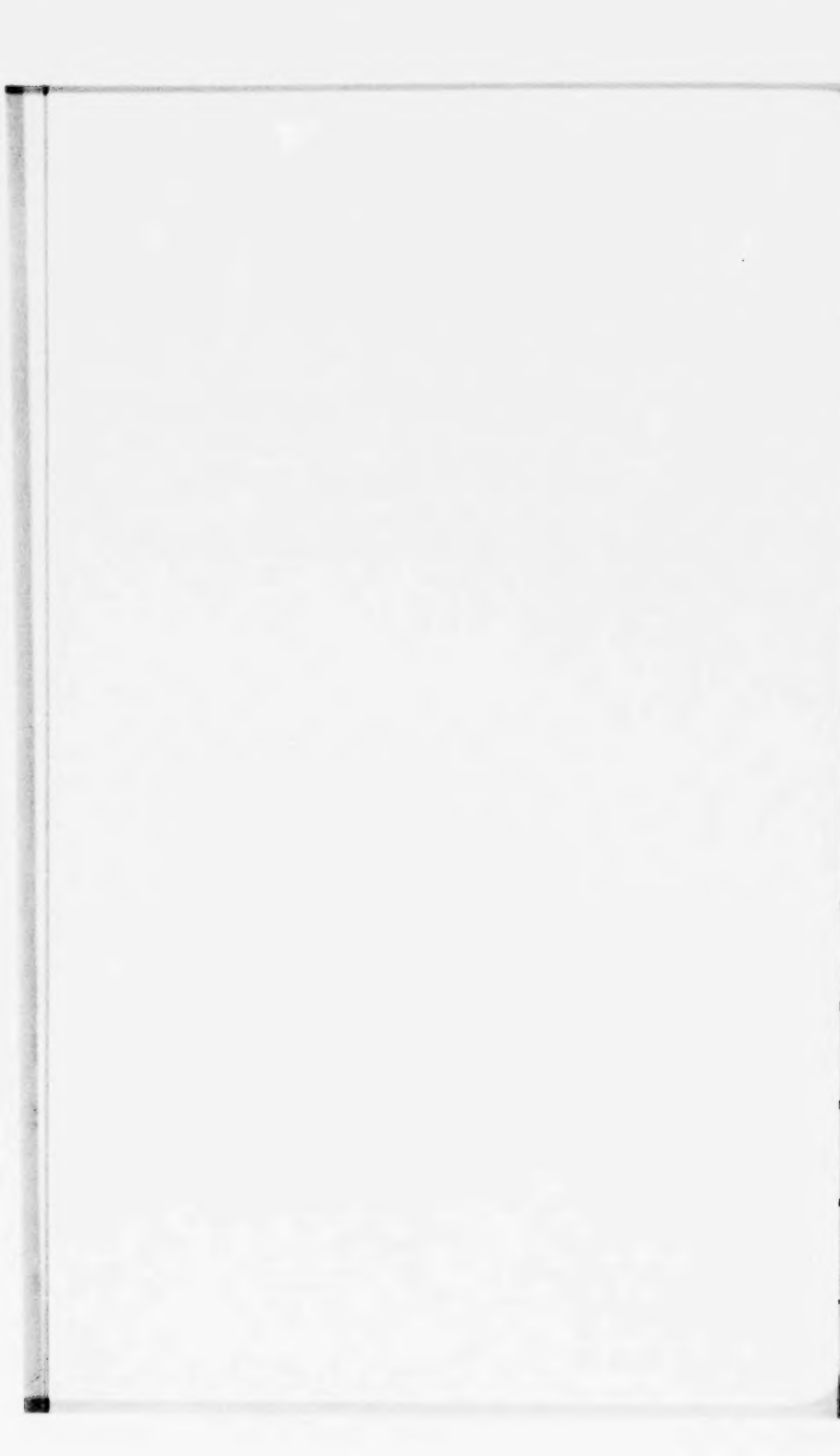
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA

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[fol. 1] UNITED STATES OF AMERICA:

**DISTRICT COURT OF THE UNITED STATES, EASTERN
DISTRICT OF LOUISIANA, BATON ROUGE DIVISION**

In Equity

No. 114

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY
versus

LOUISIANA PUBLIC SERVICE COMMISSION et als.

Appearances: Messrs. Wylie M. Barrow, Assistant Attorney General of the State of Louisiana and Francis Williams, Solicitors for Louisiana Public Service Commission and Huey P. Long, Shelby Taylor and Francis Williams, members thereof; Adolph V. Coco, Attorney General of the State of Louisiana, & W. M. Barrow, Asst. Atty. General of the State of La., appellants; Denegre, Leovy & Chaffe, Solicitors for Morgan's Louisiana & Texas Railroad & Steamship Company, Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division, to the Supreme Court of the United States, Returnable on the 15th Day of July, 1923, at the City of Washington, D. C.

Transcript of Record

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN
DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

BILL OF COMPLAINT—Filed Jan. 17, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, Baton Rouge Division:

The Plaintiff, the Morgan's Louisiana and Texas Railroad and Steamship Company, domiciled in the City of New Orleans, State of Louisiana presents this, its bill of complaint against the defendants the Louisiana Public Service Commission and against Huey P. Long, Shelby Taylor and Francis Williams as members of said Commission and Adolph V. Coco, Attorney General of the State of Louisiana and Wylie M. Barrow, Assistant Attorney General of the State of Louisiana, attorneys for said Commission and alleges as follows:

I. Petition is now, and at all of the times hereinafter mentioned was, a corporation created organized and existing under and by virtue of an act of the Legislature of the State of Louisiana adopted in the year 1877 and known as Act No. 37 of 1877 and is and was a citizen and resident of said State and the Eastern District thereof, having its domicile in the City of New Orleans, Louisiana.

II. The Louisiana Public Service Commission was created and organized and exists under and by virtue of certain provisions of the Constitution of the State of Louisiana of 1921, is a citizen of the State of Louisiana and has an office and is domiciled in and is a citizen and resident of Baton Rouge, Louisiana, in the Baton Rouge [fol. 3] Division of the Eastern District of Louisiana, and is composed of Huey P. Long, Shelby Taylor and Francis Williams.

Defendant Adolph V. Coco, is a citizen of Louisiana and a resident of the City of New Orleans in said State within the New Orleans Division of the Eastern District of Louisiana, and is Attorney General of Louisiana, duly elected, qualified and acting as such officer.

Defendant Wylie M. Barrow is a citizen of Louisiana, and a resident of the City of Baton Rouge, in said State, within the Baton Rouge Division of the Eastern District of Louisiana, and is the duly appointed qualified and acting Assistant Attorney General of the State of Louisiana and attorney for said Commission.

Defendant Huey P. Long is a citizen of the State of Louisiana resides in the City of Shreveport in said State within the Western District of Louisiana and is Chairman of said Commission. Defendant Shelby Taylor is a citizen of the State of Louisiana and resides in the City of Baton Rouge, in said State, in the Baton Rouge Division of the Eastern District of Louisiana. Defendant Francis Williams is a citizen of the State of Louisiana and resides in the City of New Orleans in said State within the Eastern District of Louisiana, and is a member of said Commission.

III. Petitioner is now and since its organization has been engaged in operating a railroad within the State of Louisiana, extending through its connections with other railroads, into other States of the United States and foreign countries, and as such is and has been since its organization a common carrier by steam of freight and passengers within the State of Louisiana within the Eastern District of Louisiana in Interstate and intrastate and foreign commerce, subject to the provisions of the acts of Congress known as the Interstate Commerce Act and amendment thereto and the transportation Act of 1920.

[fol. 4] IV. On April 9th, 1878, by Act before Andrew Hero, Jr., late Notary Public in the City of New Orleans, a certified copy of which is annexed hereto as part hereof, which act was registered in the Conveyance Office for the Parish of Orleans on the 9th day of April, 1878 in book 109, at folio 449 et seq., petitioner acquired from Charles Morgan the following described property located in that part of the City of New Orleans known as Algiers, to-wit:

A certain tract of land situate in the Parish of Orleans on the right bank of the Mississippi River in the Fifth District of the City of New Orleans, measuring three hundred and seventy-five feet front, on the Mississippi River, by twenty-four arpents in depth between parrallel lines, bounded above by what was formerly a street fifty-three feet wide called Verret Avenue separating said tract of land from the land now or heretofore of the Brooklyn Warehouse Company and below by a street called Thayer Avenue separating said tract of land from the remainder of a tract of land belonging to F. Verret, together with wharves, depots, machine shops and other buildings and improvement thereon.

Said Charles Morgan having acquired said tract of land from the New Orleans Opelousas and Great Western Railroad Company by United States Marshal's deed dated July 31st, 1869, said sale having been ordered to be made by said Marshal in proceedings entitled Charles Morgan vs. the New Orleans Opelousas and Great Western on the docket of the Honorable the Circuit Court of the United States for the Fifth Judicial Circuit and District of Louisiana.

Said property, together with other property owned by petitioner adjacent thereto, is now and for many years past has been under fence and since its acquisition under the sole and exclusive control and possession of petitioner.

Petitioner, since said acquisition, has owned and now owns, said property by fee simple title.

V. No street or road or roadway has ever been laid out, opened, dedicated, granted to or in any other manner acquired across said tract of land by the United States of America, the State of Louisiana, the City of New Orleans or any other political subdivision of said State or by the public or by any person firm or corporation except Patterson Street, which is immediately adjacent to the Mississippi River, the rights in, to, on, upon, along and over and across which are not involved in this controversy.

[fol. 5] No right to cross said tract of land has ever been granted or in any other manner acquired by the United States of America, the State of Louisiana, the City of New Orleans, or any other political subdivision of said State or by the public, or by any person, firm or corporation (except as hereinafter set forth in Article VII hereof).

VI. Said tract of land, together with land adjacent thereto is now being used and has been used by petitioner since April 9th, 1878 as the site for its shops, shop yards, railroad yards and terminals and petitioner has constructed maintained and operated thereon and is now maintaining and operating thereon shops, shop yards, railroad yards, railroad depot and other terminal facilities including a large number of railroad tracks, switches, crossovers and such other facilities as are customarily found in and are necessary for use in connection with, the maintenance and operation of railroad shops, shop yards, railroad yards and terminals. The use and operation by petitioner of said shops, shop yards, railroad yards and terminals are necessary to enable petitioner properly to serve the public and to

carry on its business of a common carrier by steam railroad in interstate and foreign commerce.

VII. Heretofore the City of New Orleans desired to obtain the right to cross with a viaduct said tract of land between the prolonged side lines of Newton Street, which street runs at right to the side lines of said tract of land, and petitioner granted to the City of New Orleans said right under the condition that said City would, among other things, construct and maintain said viaduct at its own expense, which said grant was accepted by the City of New Orleans by ordinance Number 2906, New Council Series adopted by the Council of the City of New Orleans on February 28th, 1905, and approved by the Mayor of said City on March 1st, 1905, all of which will more fully and at large appear from a copy of said ordinance [fol. 6] which is attached to this petition as a part hereof the same as if copied herein in full and marked Exhibit "A" for identification herewith. Said grant was ratified and approved by the Board of Directors of petitioner. Thereafter, during the year 1915 a viaduct for pedestrians was provided across said tract of land, between Patterson Street and the viaduct herein referred to, which said pedestrian viaduct is not involved in this controversy.

VIII. The viaduct referred to in said Ordinance Number 2906 New Council Series was constructed across said tract of land in accordance with said grant and was completed in about the year 1907, and ever since has been and is now being used as a means of crossing petitioners said tract of land along the prolongations of the side lines of Newton Street.

IX. Pending negotiations between petitioner and the City of New Orleans relative to the City of New Orleans acquiring the right to cross said tract of land with a viaduct the City of New Orleans, by Ordinance No. 2510, New Council Series adopted by the Council of said City on March 15, 1904, and adopted on June 14, 1904 a second time as amended by the franchise committee of said Council and approved on June 17, 1904 by the Mayor of said City, caused to be advertised the sale of a franchise to run for fifty years for the construction, operation and maintenance of a street railroad in that portion of the City of New Orleans known as Algiers being the fifth District of said City.

By said Ordinance the purchaser of said franchise was among other things obligated and required to maintain in good condition satisfactory to the City Engineer and Commissioner of Public Works all parts of the then contemplated and thereafter constructed, as aforesaid viaduct across petitioner's said tract of land.

Said ordinance was amended by ordinance No. 2561 New Council Series adopted by the Council of said City on July 23, 1904, approved by the Mayor thereof on July 27th, 1904, but said amendment in no wise affected the obligation on the part of the purchaser of said franchise to maintain said viaduct as aforesaid.

Said franchise was duly adjudicated to and accepted by Leigh Carroll, and Lynn H. Dinkins, and by them transferred to the Al-

[fol. 7] giers Railways and Lighting Company, same being modified in particulars not pertinent herein, said Company being a corporation organized under the laws of Louisiana, all of which will more fully and at large appear from copies of said Ordinances Nos. 2510, 2561, 3792 and 3996 annexed to this petition as part hereof, the same as if copied herein in full and Marked Exhibits "B," "C," "D," and "E" respectively for identification herewith.

Street railroad tracks were constructed on said viaduct by said Algiers Railways and Lighting Company and said Company operated its street railroad cars on said viaduct over and across said tract of land belonging to petitioner. Thereafter the South New Orleans Light and Traction Company, a corporation organized under the laws of Louisiana, acquired said franchise and now owns and operates its street railroad under and by virtue of said franchise and said company operated its street railroad cars on said tracks on said viaduct and thus across said tract of land belonging to petitioner.

X. The City of New Orleans has heretofore recognized its obligation to petitioner to maintain said viaduct by spending various sums of money in the repair and maintenance thereof and by repairing and painting same notably during the year 1920, and by Ordinance No. 5869 Commission Council Series adopted by the Commission Council of said City on September 28, 1920, approved by the Mayor thereof, on the same day instructed the Commissioner of Public Finances and the City attorney to take such steps as might be necessary to collect from the South New Orleans Light and Traction Company the sum of \$5,687.93 expended by said City for that purpose. Which will more fully appear by reference to a copy of said ordinance annexed hereto as part hereof, the same as if copied herein in full and marked Exhibit "F" for identification herewith.

On March 13, 1922, the City Attorney for the City of New Orleans rendered a written opinion that the South New Orleans Light & Traction Company was and is obligated to maintain said viaduct in accordance with said franchise as amended.

[fol. 8] XI. The South New Orleans Light and Traction Company has heretofore recognized its obligation to the City of New Orleans to maintain said viaduct by making at various times and from time to time during the last five years repairs thereto.

XII. The said viaduct, if properly maintained and kept in repair is amply sufficient to care for all traffic, foot, vehicular and street car and all other kinds across petitioners said tract of land along the prolongation of the two sides of Newton Street.

XIII. In spite of the foregoing facts and in utter disregard thereof, the Public Service Commission of the State of Louisiana did on the 11th day of November 1922 issue an order requiring petitioner to build a viaduct across its said tract of land on the site now occupied by the viaduct hereinabove referred to, said order being in the following words and figures, to-wit:

Ordered, That the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required

to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans (Algiers); the said viaduct herein ordered to commence at a point on Newton street (Algiers) at a sufficient distance from the properties of the M. L. & T. R. R. & S. S. Co. to provide suitable and proper grades for traffic thereover; all to be in accordance with plans and specifications which are hereby required to be filed with this Commission for its approval within 30 days from the date of this order; and it is further

Ordered, That within 90 days from the date of the approval of the plans herein required to be filed by this Commission that the said M. L. & T. R. R. & S. S. Co. complete and open for traffic to the public the viaduct herein required.

An application for a new trial was filed with said Commission within the time allowed by the rules of said Commission and on December 1st, 1922, said Commission refused to grant said new trial.

XIV. The order rendered by said Commission on November 11th, 1922, and herein complained of, is illegal, unconstitutional, arbitrary unjust, unreasonable null and void for the reasons hereinafter set forth, to-wit:

[fol. 9] (a) Said order deprives petitioner of its property without due process of law in violation of the provisions of the fourteenth amendment to the Constitution of the United States and of Section 2 of Article 1 of the Constitution of the State of Louisiana adopted in the year 1921, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor.

(b) Said order denies to petitioner the equal protection of the laws in violation of the provisions of the fourteenth amendment to the Constitution of the United States in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and if the said Constitution and laws, either or both provide to the contrary, then same are unconstitutional, null and void, being in violation of the provisions of the fourteenth amendment to the constitution of the United States as aforesaid.

(c) Said order impairs and renders null and void and of no effect the obligations of the City of New Orleans under the contract above mentioned existing between the City of New Orleans and petitioner under which said City acquired the right to cross petitioner's said tract of land in violation of Section 10 of Article 1 of the Constitution of the United States.

(d) Said Commission in rendering said order claims to be acting within the scope authority and jurisdiction of Section 3 of Article VI of the Constitution of the State of Louisiana adopted in the year 1921, whereas neither the provisions thereof nor any other

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of the State of Louisiana confers upon said Commission the power, authority or jurisdiction to render such an order as the one herein complained of and said Commission was and is without power, authority or jurisdiction to render the order complained of.

[10] (c) Said order was rendered after a hearing at which only one member of said Commission was present (and without giving petitioner to present argument, though timely requested) in violation of Section 3 of Article VI of the Constitution of the State of Louisiana adopted in the year 1921, and thus violates the provisions of the fourteenth amendment of the Constitution of the United States guaranteeing to petitioner the equal protection of the laws and against being deprived of its property without due process of law, in that all other hearings are had before at least two members of said Commission and unless so held said hearings do not constitute due process of law.

(f) Said order requires petitioner to make use of a part of the public streets of the City of New Orleans, jurisdiction over which is vested exclusively in said City, and said Commission is without power, jurisdiction or authority to compel or permit petitioner to occupy or in any manner use any part or portion of the public streets of the City of New Orleans.

(g) Said Order releases and extinguishes the obligation of the South New Orleans Light and Traction Company to the City of New Orleans to maintain all parts of the viaduct constructed by the City of New Orleans as aforesaid and places upon petitioner the burdens of construction and maintenance aforesaid in violation of the provisions of section 13 of Article IV of the Constitution of the State of Louisiana, in the year 1921, and the aforesaid provisions of and amendments to the Constitution of the United States.

(h) Said order is unjust, arbitrary and unreasonable and there is no public necessity therefore, in that a viaduct already exists on the site designated in the order herein complained of as aforesaid. Such viaduct, if maintained and kept in repair as it should be and would heretofore have been, as aforesaid is, would be and would continue to be for more than twenty years amply sufficient to care for all traffic, vehicular, street car, and all other kinds across petitioner's tracts of land along the prolongation of the two sides of Newton Street, and said order accordingly constitutes an unreasonable interference with and burden upon interstate and foreign commerce contrary to Section 8 of the Constitution of the United States giving to Congress of the United States power to regulate commerce with foreign nations and among the several states and the provisions of the Federal Transportation Act of 1920, enacted under the authority of said act as well as a violation of amendment XIV of said Constitution in that it deprives petitioner of its property without due process of law.

(i) Said order constitutes the taking petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company without compensation to petitioner in violation

of the XIV amendment to the Constitution of the United States, and section two of Article I of the Constitution of the State of Louisiana in that it deprives petitioner of its property without due process of law and denies to petitioner the equal protection of the law in that under the laws of the State of Louisiana, the South New Orleans Light & Traction Company, before acquiring or obtaining any right to cross petitioner's property other than that acquired by the franchise under which it is operating as aforesaid had the right to and is obligated to and required to expropriate the right so to do and to pay to petitioner in advance of the taking or acquiring thereof a just and adequate compensation therefor.

XV. Petitioner has not filed with said Commission the plans and specifications referred to in the order herein complained of and hereinabove set forth and said Commission has ordered petitioner to show cause on January 23, 1923, why it should not be fined not less than One Hundred Dollars and not more than Five Thousand dollars for failure so to do, and said Commission, unless restrained by order of this Honorable Court, will so fine petitioner.

XVI. That the proposed imposition of fines and penalties upon petitioner for not having obeyed the order aforesaid would be contrary to the Constitution of Louisiana which gives to petitioner the right to appeal to the Courts from any such order of said Commission and would be contrary to the aforesaid amendments to and provisions of the Constitutions of the United States and of the State of Louisiana on account of the invalidity of the order on which based, for the reasons aforesaid, and would be contrary to amendment XIV to the Constitution of the United States in that the imposition of the penalties provided in the Constitution of Louisiana would de-[fol. 12] prive petitioner of its property without due process of law for the reason that petitioner would thereby be deprived of its right to be heard before the Courts without, on one hand, making, in obedience to such order, payments and expenditures which could never be recovered, or, on the other hand, running the risk of exorbitant and unreasonable penalties.

XVII. The cost to petitioner to comply with the order rendered by said Commission on November 11, 1922, aforesaid and herein complained of would be greatly in excess of One Hundred and Fifty Thousand Dollars, and the property of which petitioner is deprived and the damage suffered by the balance of petitioner's said tract of land would be greatly in excess of said sum.

XVIII. This is a controversy between citizens of the same state arising under the Constitution and laws of the United States. The amount in controversy is in excess of Five Thousand Dollars.

XIX. Petitioner further shows that by said orders of said Commission and the provisions of the Constitution of the State of Louisiana petitioner is threatened by defendants that they will prosecute petitioner for the failure on the part of petitioner to comply with the order herein complained of and may bring suits against peti-

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er its agents and servants for the collection of excessive penalties provided for in the Constitution of Louisiana, and will thereby endeavor to coerce and compel petitioner to comply with said ordered order on November 11, 1922, and will subject petitioner to multitudinous and vexatious suits, and that all of said attempts, threats, actions and coercions will be carried out by defendants unless restrained by this Honorable Court.

X. Petitioner further shows that for the reasons hereinabove set forth an immediate and irreparable loss will result to petitioner unless a restraining order herein prayed for be granted before the matter can be heard on notice and that petitioner is without adequate remedy at law.

Therefore petitioner prays, as petitioner is without adequate remedy at law.

13] (1) That the order rendered by the Louisiana Public Service Commission on November 11, 1922, hereinabove complained of be declared null and void and be set aside and annulled.

(2) That defendants, and each of them, their successors in office, agents, servants, employees, agents and other parties acting under the control or authority of each and all of said defendants be enjoined from commencing any suit or proceeding or in any other manner attempting to enforce the provisions of the aforesaid order rendered by said Commission on November 11, 1922, and from enforcing or taking any steps to enforce compliance by petitioner with said order and from taking any steps whatever to collect any penalties or damages on the part of petitioner to comply with said order, and that all other parties be enjoined from proceeding against petitioner under said order.

(3) That pending the issue of a temporary injunction herein this Honorable Court may grant an interlocutory injunction restraining said defendant their agents, servants and employees and each of them from doing any of the above mentioned acts until the final hearing and order of this Honorable Court and that before the hearing and determination of petitioner's application for an interlocutory injunction this Honorable Court may forthwith grant a temporary restraining order restraining the said defendants, their agents, servants and employees and each of them from doing any of the above mentioned things until the hearing and determination of the hearing and order of this Honorable Court and that before the hearing and determination of this Honorable Court may grant an interlocutory injunction herein.

Petitioner prays not only for a writ of injunction to conform to the above prayer, but also that a subpoena of the United States District Court for the Eastern District of Louisiana issue out of and under the seal of this Honorable Court directed to the defendants, the Louisiana Public Service Commission, Huey P. Long, Shelby Taylor and Francis Williams individually and as members of the Louisiana Public Service Commission and Adolph V. Coco, as Attorney General of Louisiana and Wylie M. Brown, as Assistant Attorney General and attorney for the Louisiana Public Service Commission thereby commanding them and each of

them on a day certain therein to be named to be and appear before [fol. 14] this Honorable Court, then and there to answer (but not under oath, answer under oath being hereby expressly waived,) all and singular the premises and to perform and abide by such order, direction and decree as may meet in the premises and that on final hearing hereof said order and injunction may be made perpetual and that the order of the Louisiana Public Service Commission rendered on November 11, 1922, be set aside and annulled and for such further relief as to your Honor may seem meet, and petitioner will ever pray.

(Signed) Denegre, Leovy & Chaffe, Solicitors for Petitioner.

Affidavit of J. H. R. Parsons to above paper omitted in printing.

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

RESTRAINING ORDER—Filed January 17, 1923

The application of petitioner for a temporary restraining order having come on to be heard and determined this 17th day of January, A. D., 1923 by the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana and it having been made to appear that immediate and irreparable damage and loss will result to petitioner before the matter can be heard on notice unless this restraining order is granted.

Now, therefore, upon the filing of a bond in this cause by petitioner for the sum of Ten Thousand dollars, which bond is filed herewith and is now approved.

It is ordered that the defendants, Louisiana Public Service Commission, Huey P. Long, Shelby Taylor and Francis Williams, as members of and constituting the Louisiana Public Service Commission, Adolph V. Coco as Attorney General of the State of Louisiana Wykie M. Barrow as Assistant Attorney General of Louisiana and attorney for said Louisiana Public Service Commission, and each of them, their successors in office, and their servants, employees, agents and all persons acting under the control or authority of any and all of said defendants absolutely desist and refrain from commencing any suit of proceeding to enforce or attempt to enforce the provisions of the order rendered by the Louisiana Public Service Commission, on November 11, 1922, in which said Commission ordered petitioner, Morgan's Louisiana & Texas Railroad and Steamship Company to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans, (Algiers); said viaduct to commence at a point on Newton Street at a sufficient distance from the properties of the Morgan's Louisiana & Texas Railroad and Steamship Com-

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[fol. 16] pany, petitioner to provide suitable and proper grades for traffic thereover etc., and further ordering petitioner within thirty days of the date of said order to file with said Commission plans and specifications for said viaduct, and further ordering said petitioner to complete and open for traffic to the public said viaduct within ninety days of the date of said order, and from imposing any fine or penalty against petitioner, Morgan's Louisiana and Texas Railroad and Steamship Company for its failure to comply with said order and from instituting any suits or proceedings against petitioner, its agents or servants seeking to collect any fines forfeitures or penalties against and from petitioner on account of petitioner having failed to comply with said order until the final hearing of this cause or further order of this Court.

It is further ordered that said defendants and each of them show cause if any they have on the date to be hereafter fixed in the District Court of the United States for the Eastern District of Louisiana why the prayer of said bill of complaint for a preliminary injunction should not be granted.

(Signed) Rufus E. Foster, Judge.

Dated at New Orleans, Louisiana, this 17th day of January A. D., 1923., at the hour of 1.55 o'clock P. M.

[fol. 17] EXHIBIT IN EVIDENCE: ACT OF SALE CHARLES MORGAN to M. L. & T. RR SS Co.—Filed January 17, 1923

STATE OF LOUISIANA.

PARISH & CITY OF NEW ORLEANS:

9th April, 1878

Sale of Railroad &c.

Charles Morgan

to

Morgan Louisiana and Texas R. R. & S. S. Coy.

Be it known, That on this Ninth day of April in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America, the one hundred and second, before me, Andrew Hero, Jr., a Notary Public in and for the Parish and City of New Orleans, State of Louisiana, duly commissioned and qualified and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Alexander C. Hutchinson, of this city, herein acting in his capacity as the authorized agent and attorney in fact of Charles Morgan of the City of New York, State of New York, under and by virtue of proper authority in him vested by said Morgan.

Which said Hutchinson declared in his said capacity and for and on behalf of his said constituent Charles Morgan, that for the consideration and on the terms and conditions hereinafter expressed, and in the performance and covenant for further assurance of the contract of sale entered into by said Charles Morgan with the hereinafter named purchaser under date of the first day of April inst., he said Hutchinson does by these presents for and in the name and behalf of said Charles Morgan grant, bargain, sell, convey transfer, assign and set over with a full guarantee against all troubles, debts, liens, mortgages, claims, evictions or other encumbrances of every nature or kind whatsoever unto Morgan's Louisiana and Texas Railroad and Steam Ship Company, a duly organized corporate body of this State, domiciled in this city, instituted under Act No. 37 of the Legislature of this State for the year 1877, approved March 8th, 1877, and herein represented by George Pandely, one of the Directors thereof, under the authority in him vested by the Board of Directors thereof, adopted at their meeting held on the day and date hereof, a duly certified copy of which said resolution is [fol. 18] hereto annexed for reference; Said George Pandely being here present, accepting and purchasing for and on behalf of said Morgan's Louisiana and Texas Rail Road and Steam Ship Company and its assigns, and in its name and behalf acknowledging delivery and possession, of all and singular the following described and mentioned franchises immunities, privileges and rights, real, personal and mixed property and effects and appurtenances, together with the real estate and property specifically set forth as follows:

First, All and singular the Railroad with its main tracks and branches erected, constructed and in operation from New Orleans to Berwick's Bay in the State of Louisiana, under the rights and franchises originally granted to the New Orleans Opelousas and Great Western Rail Road Company, being a distance of about Eighty miles, together with the roadbeds of the main tracks and branches, and also, all the depots and lands specially appertaining thereto, all the buildings, wharves and all the equipments and franchises belonging or appertaining unto the said Rail Road, and also all and singular the Cars, locomotives, engines, machinery, fixtures utensils, implements, rights of way and effects generally of every nature and description whatsoever in and upon the aforesaid Rail Road, or in any wise attached or appertaining to the same, without any exception or reservation whatsoever and among which is comprised certain landed property more particularly described as follows viz:

(Here follows description of 36 pieces of real estate involved in this case)

* * * * *

37th, A certain tract of land situate in the Parish of Orleans on the right bank of the Mississippi River in the Fifth District of this City measuring three hundred and seventy-five feet front on the Mississippi River by twenty-four arpent in depth between parallel

lines bounded above by a street fifty three feet wide called the Verret Avenue, separating said tract of land from the land now or heretofore of the Brooklyn Warehouse Co. and below by a street called Thayer Avenue separating said tract of land from the remainder of a tract of land belonging to F. Verret, together with the Wharves, Depots, Machine Shops and other buildings and improvements erected thereon.

(Here follows description of about 100 pieces of real estate and other property not involved in this case.)

* * * * *

[fol. 19] To have and to hold the herein described and conveyed Rail Roads, franchises, rights of way, real estate, lands, property, wharves, ferries and effects unto the aforesaid Morgan's Louisiana & Texas Rail Road and Steam Ship Company forever, with full substitution and subrogation to all rights and actions of warranty of said Morgan against all former owners or proprietors of all or any part or parts of the said real personal and mixed estate, property, movable and immovable and effects of every nature and kind.

And by reference to the annexed certificate of the Register of Conveyances in and for this city and Parish, of even date herewith, it will be seen that the said Charles Morgan has not heretofore alienated any of property, real, personal or mixed and the rights, franchises, etc., herein described and conveyed.

This sale is made and accepted for and in consideration of the total price and sum of five millions, sixteen thousand dollars, (\$5,016,000). Four millions, nine hundred and ninety-four thousand dollars of which said price has been settled and liquidated by the obligation and promise herein made and entered into by said Pandely, for and on behalf of said Morgan's Louisiana & Texas Rail Road and Steam Ship Company, to furnish and issue unto the aforesaid Charles Morgan or his heirs and assigns, forty nine thousand, nine hundred and forty shares of One hundred Dollars each of full paid capital stock of said Morgan's Louisiana & Texas Rail Road & Steam Ship Company and to deliver the necessary certificates thereof within the shortest possible time from and after the date hereof unto said Morgan, or his heirs and assigns; and for the remainder of the aforesaid purchase price, amounting to the sum of Twenty two thousand Dollars, the said Pandely in his aforesaid capacity and for and on behalf of said Morgan's Louisiana & Texas Rail Road and Steam Ship Company, hereby promises and binds said Company to furnish and deliver unto said Charles Morgan, his heirs, representatives and assigns, Twenty two bonds of One thousand dollars each of the aforesaid Morgan's Louisiana and Texas Railroad and Steam Ship Company, of date of the first of April instant, and payable at forty years after date in the City of New York, state of New York, with interest thereon at the rate of Seven percent per annum from their date until final payment and the said interest being payable semi annually on the delivery of the several coupons attached to said Bonds, with which said stock and bonds the aforesaid Hutchinson

[fol. 20] declares his said constituent to be satisfied, contended and paid in the premises, and for and on behalf of said Charles Morgan reserves and retains a special vendor's privilege or lien upon all of the herein mentioned & described franchises, rights, immunities and privileges, real estate, personal and mixed property and effects as security for the delivery of the aforesaid Bonds and Shares of Stock.

And here the parties to this act declared that they dispense with the production of certificates from the Recorders of Mortgages for the several Parishes through which the aforesaid Rail Road is constructed or in which any of the real estate herein described is situated, as otherwise required by law for annexation hereto.

Thus done and passed in my office, in New Orleans aforesaid, in the presence of David J. Dowers and John Bismark Schaffer witnesses both of this City, who hereunto sign their names with the parties and me, the said Notary, the day and date aforesaid.

Originally Signed: A. C. Hutchinson, G. Pandely, D. J. Dowers, John Bismark Schaffer, Andrew Hero, Jr., Notary Public.

Registered in Conveyance office for the Parish of Orleans, State of Louisiana, in Conveyance Book 109, folios 449 to 466 both inclusive. New Orleans, April 9th, 1878.

(Signed D. B. Penn. R. C.

Recorded in Mortgage Office in Book 171 folios 101 to 122. New Orleans, April Ninth, 1878.

(Signed) J. D. Richardson, Dy. R.

[fol. 21] Certificate of Fred Deibel, Custodian, to above exhibit omitted in printing.

[fol. 22] EVIDENCE: EXHIBIT A—ORDINANCE No. 2906, N. C. S.—
Filed January 17, 1923

Mayoralty of New Orleans

City Hall, March 1, 1905.

Calendar No. 3615

No. 2906, New Council Series

An Ordinance Accepting the Bid of William W. Bierce, Limited, for the Construction of a Viaduct in the Fifth Municipal District, Algiers.

Section 1. Be it ordained by the Council of the City of New Orleans, That the bid of Wm. W. Bierce, Limited, to furnish all materials, labor, tools, and service, and construct according to the outline plant in the office of the City Engineer and the specifications

attached to their bid and plans and specifications submitted with their bid, a viaduct over the tracks of the Morgan Louisiana and Texas Railroad in Algiers on the prolonged lines of Newton street, and to complete the same within six months after award of the contract, for the sum of fifty-four thousand seven hundred and sixty (\$54,760.00) dollars, said viaduct to have a foot walk on each side, in accordance with their bid of November 4th, 1904, be, and the same is hereby accepted, and the Mayor be, and he is hereby directed to enter into notarial contract with the said William W. Bierce, Limited, for the work as per their bid of November 4th, 1904, above quoted.

Section 2. That the said bid of William W. Bierce, Limited, is, however, accepted subject to the terms and conditions set forth in the letter dated New Orleans, La., January 25, 1905, addressed to the Honorable the Mayor and Council of the City of New Orleans, signed by E. B. Cushing, General Superintendent of the Morgan's Louisiana & Texas Railroad & Steamship Company, which said terms and conditions have been duly ratified by certified copy of a resolution of the Board of Directors of said Company of date February 7, 1905, annexed to said letter of E. B. Cushing, which said letter reads as follows: "To the Honorable the Mayor and Council of the City of New Orleans; Gentlemen—Referring to Ordinance No. 2470, New Council Series, and to the proposed viaduct to be constructed over the property and tracks of the Morgan's Louisiana & Texas Railroad and Steamship Company along the line of extension of Newton street in Algiers, I beg to say that the said company consents to the construction, location and maintenance of said viaduct by the City of New Orleans as shown by the plan hereto annexed and marked exhibit "A." upon the following conditions, viz: That there is to be a clearance of not less than 22 feet between the lowest part of this viaduct and the top of the rail of the company's said tracks crossed by the same, and that no part of the viaduct is to come within six feet of the rail of said tracks; that the contractor for the erection and construction of such viaduct shall so perform the work as not to interfere with the use and operation by the railroad company of its said tracks, or to endanger the safety of its employees; that the proposed arrangement of the said company's tracks is shown on said plan hereto attached and made part of this agreement, and the said viaduct is to conform to said tracks as shown on said plan, whether the same be now constructed or not; and finally, that the said company shall have the right, at any time, at its expense, to make such changes in the location of the piers or foundations of the viaduct as may be necessary in its opinion to accommodate the structure to any rearrangement of its tracks or change in the method of using its yards which it may hereafter adopt, provided such changes be made at the expense of the said company and without injury to the said viaduct. Upon these conditions the company consents to and grants to the City of New Orleans the right to construct and maintain permanently said viaduct across the company's said property. This letter, if satisfactory to the city, will be ratified by the directors of the Morgan's Louisiana

and Texas Railroad and Steamship Company, Yours truly, E. B. Cushing, General Superintendent.

Section 3. Payment for the work to be made as follows: \$15,000.00 in the reserve fund of 1905, \$15,000.00 in the reserve fund of 1906 and \$10,000.00 in the reserve fund of 1907 pursuant to the provision of Ord. No. 2470, N. C. S., \$13,333.33 to be received from the purchasers of the street railway franchise sold pursuant to the provisions of Ord. No. 2510, N. C. S., as amended by Ord. 2561, N. C. S., and the balance to be provided for by an additional appropriation in the reserve fund on 1907.

Adopted by the Council of the City of New Orleans, February 28th, 1905.

T. W. Campbell, Clerk of the Council.

Approved March 1, 1905. Martin Behrman, Mayor.

A true copy. W. P. Ball, Secretary to the Mayor.

[fol. 23] EVIDENCE: EXHIBIT B—Filed Jan. 17, 1923

Mayoralty of New Orleans

City Hall, June 17th, 1904.

Calendar No. 2811

No. 2510, New Council Series

An Ordinance Directing the Advertisement and Sale of a Franchise to include the Construction and Operation of a Street Railway in the Fifth District of the City of New Orleans

Section 1. Be it ordained by the City Council of the City of New Orleans. That the Comptroller be and he is hereby directed to advertise according to law for the sale of a franchise that will embrace the authority and right to construct maintain and operate for a term of fifty (50) years, a street railway in and through certain hereinafter named streets in the Fifth District of the City of New Orleans all in accordance with and subject to the hereinafter prescribed terms, conditions and specifications; and, further that the Comptroller be and he is hereby directed and authorized to sell the franchise provided for by this ordinance to the bidder who offers the highest percentage of the gross annual income derived from the said franchise, after deducting only the taxes paid by the purchaser to the City of New Orleans and State of Louisiana on account of the ownership and operation of the said franchise.

Franchise Purchaser, City and State

Wherever the word "franchise" is used in this ordinance it shall be understood and agreed to mean the franchise provided for by this ordinance; wherever the word "purchaser" is used in this ordinance it is understood and agreed to mean the person or corporation who shall acquire the franchise provided for by this ordinance and wherever the word "city" and the word "State" are used in this ordinance they are understood and agreed to mean the City of New Orleans and the State of Louisiana, respectively.

Term

The term of the franchise shall extend for fifty (50) years from the date that the hereinafter described bond shall be filed with the Mayor of the City of New Orleans.

Route

The street railway shall commence at the intersection of the Orleans Jefferson parish line and Teche street and with a single track extend along Teche street to Opelousas avenue, thence on and across [fol. 24] Opelousas avenue to Bouny Street, thence along Bouny street to Protection levee thence along and over Protection levee to Morgan street, thence along Morgan street to Patterson street, thence along Pacific avenue to Newton street, thence along Newton street crossing the tracks of the Morgan's Louisiana and Texas Railroad Co. and Steamship Co., on a viaduct that the city guarantees to provide as Newton street now is, or may hereafter be, or such other public highway as may exist or hereafter be created to McLellanville, and thence to the Mississippi river. The city does not guarantee to provide space upon which to construct and operate the street railway from the eastern end of the viaduct above referred to, to McLellanville, and thence to the Mississippi river; such part of the requisite right of way as may not be the property of the city shall be acquired by the purchaser. It is distinctly understood and agreed by the city and the purchaser that the city guarantees to furnish right of way in, on and through present or future public property only.

Viaduct

The purchaser shall pay in cash to the city, as compensation for that part of the viaduct which is to be used by the purchaser as part of its roadbed an amount equal to one-third (1/3) the cost of the viaduct over the tracks of the Morgan Louisiana and Texas Railroad Co., and Steamship Co., provided that the cost of the viaduct shall not exceed forty thousand dollars (\$40,000.00). Should the cost of the viaduct amount to more than forty thousand dollars (\$40,000.00), the purchaser shall not be liable for nor will he be required to contribute more than thirteen thousand three hundred and thirty three dollars and thirty three cents, (\$13,333.33) on ac-

count thereof. Payment by the purchaser shall be made within sixty days (60) after completion of the viaduct. The purchaser shall in addition to contributing to the cost of the above described viaduct be obligated to and he shall maintain all parts of the said viaduct in good condition satisfactory to the City Engineer and Commissioner of Public Work throughout the term of the franchise.

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Motive Power

The motive power shall be either compressed air, electricity, or any other improved system of the rapid transit except steam, that may be hereafter approved and permitted by the council.

Construction

All main tracks, switch tracks, spurs and turn-outs shall be constructed according to lines and levels furnished or approved by the City Engineer.

The tracks shall be standard street railway gauge, and they shall be formed of sound and free from sap cypress, pine or oak cross ties measuring not less than 72" x 8" x 6" inches and spaced not more than 30" inches from center apart, and 90 pound standard girder rails. The rails shall be securely spiked to cross ties and they shall be securely joined to each other with standard fittings and connections.

All culverts crossed by the railway track or tracks included in the franchise shall between the rail of each track and for one foot outside of each rail be constructed in a first class workmanlike manner of wood or brick, as the City Engineer and Commissioner of Public Works may designate, and such culverts shall be kept in thorough repair by the purchaser throughout the term of the franchise.

The track or tracks that will rest upon the earthen ramps and levee in the vicinity of Morgan and Bouny streets, shall be paved and maintained with wood or other material satisfactory to the City Engineer and Commissioner of Public Works.

All existing pavements that may be disturbed by the purchaser in construction tracks shall be reconstructed by him and in a manner satisfactory and acceptable to the City Engineer and Commissioner of Public Works.

Should any unpaved or paved street occupied by a track or tracks be ordered paved or repaved the purchaser shall pay the cost of paving or repaving between the rails of each track and for one foot on the outside of each rail.

[fol. 26] The purchaser shall be obligated to and he shall during the terms of the franchise keep in good repair and condition that part of all paved and unpaved streets between the rails of a track and for one foot on the outside of each rail should the purchaser after having been given forty eight (48) hours notice neglect or refuse to comply with this obligation the Commissioner of Public Works shall do the necessary work at the expense of the purchaser and in case the purchaser should refuse to pay for the cost of the said work so done, the amount thereof shall be recoverable before

any court of competent jurisdiction for the benefit of the city. It is expressly understood and agreed by the purchaser and the city that the provisions of Act 133 of the General Assembly of the State of Louisiana for the year 1888 are written into and form a part of this ordinance and in addition to the hereinbefore prescribed remedies should the purchaser at any time refuse to comply with all of the provisions of this ordinance or should he fail to comply with the notification addressed to him by either the City Engineer or Commissioner of Public Works or both or should the purchaser refuse or neglect to keep the culverts and streets in good order and condition, he or his authorized representative shall be subject to a fine of twenty-five (\$25.00) dollars or thirty (30) days imprisonment for each and every offense at the discretion of the court said fine to be recoverable before any court of competent jurisdiction.

That for the purpose of crossing the property of the Morgan's Louisiana and Texas Railroad and Steamship Company on Newton street, the purchaser of the franchise shall construct at his own expense a viaduct at a grade not to exceed three (3) per cent per foot at a height where the same shall cross the property of the Morgan's Louisiana and Texas Railroad and Steamship Company, not less than twenty-five (25) feet, and of a width and arrangement sufficient not only to provide for laying of railway tracks under this franchise, but also for the free passage of vehicles and pedestrians, said viaduct to be constructed according to the plans and specifications to be approved by the City Engineer. Provided that the purchaser shall not be obliged to construct its road from Pacific avenue along Newton street and the continuation thereof, except within two years after said Newton street shall have been opened from the point where it now ends at Verret avenue. Provided, further that no grant of a right to use said viaduct for railway purposes shall be hereafter [fol. 27] made by the city except upon the condition that the new grantee or grantees shall pay the proper proportion of the original cost of construction and the cost of maintenance of such viaduct.

Time of Completion

The railway shall be constructed and in operation from the Orleans-Jefferson parish line to the western end of the hereinbefore described viaduct within eighteen (18) months after the date the hereinafter described bond shall have been filed with the Mayor of the City of New Orleans, and the railway shall be constructed and in operation on the viaduct and thence to the terminus at the Mississippi river in the Vicinity of McLellanville, within nine (9) months after the viaduct has been completed, provided that the prescribed time for completing this part of the railway shall be extended without prejudice to the purchaser to the extent of delays if any, experienced in acquiring rights of ways.

Should the purchaser fail to comply with the provisions of the preceding paragraph he shall forfeit to the city, not as a penalty but as acknowledged liquidated damages the sum of ten thousand dollars (\$10,000.00) without the formality of being placed in default and without judicial proceedings.

Cars

The cars shall be of improved pattern and fitted with ventilators; they shall at all times be kept neat and clean and in good condition.

The erection of all poles mast or fixtures wires, electrical conductors and cables that may be necessary for the operation of the railway shall be constructed and maintained in accordance with existing city ordinances and State Laws that govern same, or that may be adopted hereafter and to the satisfaction of the Commissioner of Police and Public Buildings and the City Electrician.

Time

The cars shall not run at a greater interval than one every twenty five minutes from daylight to 9 p. m. and every forty five minutes from 9 p. m. to 12.30 a. m.

After the railway has been in operation for five (5) years, the [fol. 28] council of the City of New Orleans shall have power to change the above schedule to shorter intervals by a two third vote (2/3) of the members elected to the council; provided such intervals shall not exceed six (6) minutes.

Fares

The fare shall be five cents (5¢) for a continuous ride from terminus to terminus or from one point to another point between terminals from 5 a. m., to 12:30 a. m. and thereafter the fare shall be ten (10¢) cents.

Railroad Crossings

At points where the tracks cross other tramways or steam railroad tracks, crossing shall be constructed of steel in such manner as to form a continuous rail from each track. Plans of such crossings shall be submitted to and approved by the City Engineer.

Speed

The speed of the cars shall not exceed twelve (12) miles per hour in the improved sections of the city, nor twenty-five (25) miles per hour in the unimproved section of the City.

Reversion of Property

At the expiration of the term of the franchise, all railway tracks, rolling stock equipment fixtures, real estate, bonds, structures, and other things belonging to the purchaser that are necessary to and included in the maintenance and operation of the railway shall become the property of the City, upon the city paying therefor, such valuation as it may be determined to possess; said valuation shall be determined by two disinterested persons, one of whom shall be appointed by the Mayor of the city of New Orleans, and the other shall be appointed by the purchaser. Should the said appraisers fail

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agree on a valuation the Civil District Court, or its lawful successor shall appoint an umpire and the finding and the decision of the said umpire shall be final and binding on the city and the purchaser.

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Assignments

The purchaser shall be privileged, with the consent of the City Council, expressed by ordinance to assign and convey the franchise to any competent person or corporation.

Freight Privilege

It is understood and agreed by the city and the purchaser that the franchise shall never be used by or form a part of any railroad engaged in State or interstate commerce, the true intent and meaning of this ordinance being to provide a street railway for passenger service only, but subject to such rules and regulations as the City Council may, from time to time prescribe/ the purchaser may be permitted to operate freight cars for the handling of local commerce.

Side Tracks and Switches

The purchaser shall be privileged within five years after the commencement of construction to construct such side tracks, switches, crossovers and turn outs, as he may deem necessary to operate the railway; thereafter should additional side tracks or switches be deemed necessary for the proper operation of the railway, the privilege to construct and operate the same must be obtained from the City Council.

All side tracks, switches, and turn outs shall be constructed according to lines and levels furnished or approved by the City Engineer.

Guaranty

Before the sale of the franchise is commenced each intending bidder shall deposit with the Comptroller a certified check or any State or National bank domiciled in the City of New Orleans to his (the Comptroller's) order for the sum of five thousand dollars (\$5,000.00) as a guarantee that the depositor of the said check will, if his bid be accepted, accept the franchise in accordance with the advertisement and adjudication within forty-eight (48) hours after receipt from the City Notary that the instrument is ready for signature. The Comptroller shall not recognize bidders who have not, prior to the commencement of bidding, deposited with him the above described guaranty check.

§ 1.30] The Comptroller shall at the conclusion of the bidding return the guaranty checks of unsuccessful bidders, but the Comptroller shall not return the check of the successful bidder until such bidder has accepted the franchise and furnished the hereinafter described bond.

Should the bidder to whom the franchise be awarded fail to accept the franchise and furnish the hereinafter described bond

within the allotted time, the five thousand dollars (\$5,000.00) guaranty deposited by him shall ipso facto be forfeited to the City of New Orleans not as a penalty, but as acknowledged liquidated damages without the formality of being placed in default and without judicial proceedings.

Bond

The successful bidder shall furnish bond with a surety company satisfactory to the Mayor and City Council, in an amount of ten thousand dollars (\$10,000.00), as surety for the faithful compliance by him with all the terms conditions, specifications and provisions of this ordinance. This bond shall be furnished by the successful bidder within 100 days after the date on which the Comptroller adjudicates the sale and within twenty-four (24) hours after the City Notary has notified the said bidder that the acceptance of the franchise is ready for signatures.

Adopted first time by the Council of the City of New Orleans, March 15, 1904.

T. W. Campbell, Clerk of Council.

Adopted second time as amended by the franchise committee June 14, 1904.

T. W. Campbell, Clerk of Council.

Approved June 17, 1904. Paul Capelevielle, Mayor.

A true copy. L. A. Hubert, Secretary to the Mayor.

[fol. 31] EVIDENCE: EXHIBIT C—Filed Jan. 17, 1923

Mayorality of New Orleans, City Hall

July 27, 1904.

Calendar No. 3282

No. 2561, New Council Series

An Ordinance Amending Ordinance No. 2510, N. C. S., Being an Ordinance Directing the Advertisement and sale of a Franchise to Include the Construction and Operation of a Street Railway in the Fifth District of the City of New Orleans.

Section 1. Be it ordained by the Council of the City of New Orleans, the Committee on Finance concurring, that Ordinance No. 2510 N. S. C., being an ordinance relative for the sale of a franchise in the Fifth District for the construction and operation of a street railway, be and the same is hereby amended as follows:

After the word "jurisdiction" in the last line of paragraph "Construction" strike out the following words:

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"That for the purpose of crossing the property of the Morgans' Louisiana and Texas Railroad and Steamship Company on Newton street, the purchaser of this franchise shall construct at its own expense a viaduct at a grade not to exceed three (3) per cent per foot at a height where the same shall cross the property of the Morgans' Louisiana and Texas Railroad and Steamship Company, not less than twenty-five *feet* (25) feet, and of width and arrangement sufficient not only to provide for laying of railway tracks under this franchise, but also for the free passage of vehicles and pedestrians, said viaduct to be constructed according to the plans and specifications to be approved by the City Engineer, provided, that the purchaser shall not be obliged to construct its road from Pacific avenue along Newton street and the continuation thereof, except within two years after said Newton street shall have been opened from the point where it now ends at Verret avenue, provided further that no grant of a right to use said viaduct for railway purposes, shall be hereafter made by the City, except upon the condition that the new grantee or grantees shall pay the proper proportion of the [ol. 32] original cost of construction and the cost of maintenance of such viaduct."

Section 2. Be it further ordained, etc., That Ordinance No. 2510 C. S., as above amended be and the same is hereby re-enacted.

Approved by the Franchise Committee.

W. H. Merrick, Clerk.

Adopted by the Council of the City of New Orleans, July 26, 1904.
T. W. Campbell, Clerk of the Council.

Approved July 27, 1904. Paul Capdevielle, Mayor.

A true copy. L. A. Hubert, Secretary to the Mayor.

[ol. 33] EVIDENCE: EXHIBIT D—Filed Jan. 17, 1923

Mayoralty of New Orleans

City Hall, June 11, 1906.

Calendar No. 5150

No. 3792, New Council Series

Ordinance Authorizing Assignment and Transfer of a Certain Franchise to Operate an Electric Railway in the 5th District by the Purchasers Thereof

Section 1. Be it ordained by the Council of the City of New Orleans that Leigh Carroll and Lynn H. Dinkins are hereby authorized

to transfer, assign and convey to the Algiers Railway and Lighting Company, its successors and assigns, all their right, title and interest in and to a certain franchise adjudicated by the Comptroller of the City of New Orleans on November 21, 1904, all as more fully set out in a certain Notarial Contract entered into between said Leigh Carroll and Lynn H. Dinkins and the Mayor of the City of New Orleans on or about March 1st, 1905, before Wm. V. Seeber, the City Notary Public, and the Consent of the City Council is hereby given to such transfer and assignment and the same is hereby ratified and confirmed.

This authorization consent and ratification of said transfer and assignment is given with the condition that the assignee shall be bound by all the terms conditions and obligations of said franchise and *and* of the said contract of March 1, 1905, before W. V. Seeber, with the modification now made, that the said Carroll, and Dinkins or their assignees, the Algiers Railway and Lighting Company will construct, maintain and operate the street railway covered by said franchise over the viaduct in Newton Street as said viaduct may be finally located by the city on said street within five years from date and further that the city obligates itself to secure to the street railway company the necessary rights of way to reach the viaduct from Pacific avenue along Opelousas avenue and Elmira avenue or Belleville [fol. 34] street, and Newton street without additional cost; and further that the surety on the bond of said Carroll and Dinkins on said contract of March 1, 1905, shall give its consent to this transfer and agree to be bound for the performance of all the obligations of said contract and this Ordinance; provided that the said Algiers Railway and Lighting Co., will enter into a notarial act agreeing to said terms above mentioned all in compliance with letter of Leigh Carroll and Lyman H. Dinkins, addressed to the City Attorney of date June 1, 1906, and attached hereto and made part hereof.

Adopted by the Council of the City of New Orleans June 5, 1906.

T. W. Campbell, Clerk of the Council.

Approved June 11, 1906. Martin Behrman, Mayor.

A true copy. W. P. Ball, Secretary to the Mayor.

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fol. 35] EVIDENCE: EXHIBIT E—Filed Jan. 17, 1923

Mayoralty of New Orleans

City Hall, Sept. 6, 1906.

No. 3996, New Council Series

n ordinance modifying the term of the bond furnished by Leigh Carroll and Lynn H. Dinkins, pursuant to Section 1, Ordinance No. 2510, New Council Series, obligating said parties or their assignee to furnish a new bond every five years during the term of the street railroad franchise sold to them thereunder; fixing a time for the use of and payment for the viaduct to be built under said Ordinance No. 2510, New Council Series; modifying the route of the street railroad to be build under said Ordinance No. 2510, New Council Series, and extending the time of completion of said railroad.

Whereas, pursuant to the provisions of Ordinance No. 2510 New Council Series, Leigh Carroll and Lynn H. Dinkins became the purchaser of the street railroad franchise therein described for a term of fifty years from the first day of March, 1905, the date of the execution of the Notarial Contract therein provided and did in accordance with the provisions of said ordinance furnish a bond in favor of the city of New Orleans for the sum of ten thousand (\$10,000.00) dollars, with the American Surety Company of New York as surety for the faithful compliance with all the terms conditions, and specifications of said ordinance all as per act before William V. Seeber, City Clerk, of date March 1, 1905; and

Whereas said Carroll and Dinkins desire to assign said franchise to the Algiers Railway and Lighting Company, and the City of New Orleans by Ordinance No. 3792, New Council Series, has consented to said assignment, provided the American Surety Company, surety for said Carroll and Dinkins as aforesaid shall consent thereto; and

Whereas the American Surety Company is unwilling to consent to said transfer unless the term of said bond be reduced; and

fol. 36] Whereas the City of New Orleans is unable to build the viaduct in Newton street over the tracks of the Morgan's Louisiana & Texas Railroad Company—as provided for in Ordinance No. 2510, New Council Series, but has found it necessary to change the western terminus of said viaduct; and

Whereas in consequence of the foregoing, it has become necessary to modify the route of said railroad as set out in Ordinance No. 2510, New Council Series and to grant the right to construct and operate the said railroad over and along other and different streets from those set out in said Ordinance No. 2510, New Council Series in order to reach and cross said viaduct in its changed location; and Whereas the modifications and changes made necessary by the above circumstance have rendered it impossible to construct said railway within the time provided for in the contract:

Section 1. Be it ordained by the Council of the City of New Orleans that the bond heretofore furnished by the said Leigh Carroll and Lynn H. Dinkins to the City of New Orleans in the sum of ten thousand (\$10,000.00) dollars with the American Surety Company of New York as surety in accordance with the provisions of said Ordinance No. 2510, New Council Series for the faithful compliance by them with all the terms, conditions specifications and provisions of said ordinance as per act before William V. Seeber City Notary of date March 1, 1905, shall expire and cease, and the surety thereupon be released from all further responsibility and liability in the premises on October 1, 1911, upon the condition that the said Surety Company, through its properly authorized representative's consent to said transfer and be made a party to the notarial act of transfer provided for by Ordinance No. 3792, New Council Series and bind itself as therein and herein provided and the Mayor of the City of New Orleans is hereby authorized, empowered and directed to execute all necessary acts and writings and do all things proper to carry out the provisions of this ordinance.

[fol. 37] Sec. 2. Be it further ordained that on or before July 1, 1911, said Carroll and Dinkins or their assignee, the Algiers Railway and Lighting Company, shall cause to be executed and delivered to the City of New Orleans, a good and solvent bond, executed by an authorized surety company, or other surety, satisfactory to the City of New Orleans, in the sum of ten thousand (\$10,000) dollars, said bond to run for a period of five years from October 1, 1911, for the faithful compliance by them or their assignees of the terms conditions *specifications* and provisions of said Ordinance No. 2510, New Council Series during the term for which said bond is to run, and they and their assignees shall renew said bond on or before the same day in each five-year period during the life of said franchise.

Sec. 3. Be it further ordained that the time within which said Leigh Carroll and Lynn H. Dinkins and their assignee, the Algiers Railway and Lighting Company shall construct said railway over the viaduct in Newton Street, as provided for by Ordinance No. 3792, New Council Series and pay for the use of said viaduct shall expire on October 1, 1910, always subject to the condition that said parties shall have at least sixty days after the completion of said viaduct within which to construct said railway over the same and make the payment for the use thereof.

Sec. 4. Be it further ordained that full right, power and authority is hereby granted to Leigh Carroll and Lynn H. Dinkins, and their assignee the Algiers Railway and Lighting Company to build construct and maintain and operate until March 1, 1955, in addition to and as part of the street railway provided for in Ordinance No. 2510, New Council Series a street railway from Pacific avenue along a street railway from Pacific avenue along Opelousas avenue to and along Belleville street to Newton street, or along Opelousas avenue to and along Elmira avenue to Newton Street, and also *also* along and through Newton street from Teehe street to Pacific avenue, with the

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necessary curves and switches and connections all subject to the terms specifications and privileges as set out in Ordinance No. 2510, New Council Series.

fol. 38] Sec. 5. Be it further ordained that the time of completion of said railroad as provided for by Ordinance No. 2510, New Council Series is hereby extended until the first day of April, 1907, and further that the grantees of said franchise are entirely relieved of all obligation to construct and operate that part of said railroad on Pacific avenue from Opelousas avenue to Newton street.

Sec. 6. Be it further ordained that the said Leigh Carroll and Lynn H. Dinkins and their assignee, the Algiers Railway and Lighting Company shall have power and authority and are hereby authorized and empowered to mortgage, pledge and hypothecate the said railroad franchise as set out in Ordinance No. 2510, New Council Series with all modifications as set out in Ordinance No. 3792, New Council Series, and those contained in this ordinance.

Sec. 7. Be it further ordained that the Mayor of the City of New Orleans, is hereby authorized empowered and directed to execute all necessary acts and writings and do all things proper to carry out the provisions of this ordinance.

Sec. 8. Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed.

Adopted by the Council of the City of New Orleans, Sept. 4, 1906.
T. W. Campbell, Clerk of Council.

Approved Sept. 6, 1906. Martin Behrman, Mayor.

A true copy. Edwin A. Packard, Acting Secretary to the Mayor.

fol. 39] EVIDENCE: EXHIBIT F—Filed Jan. 17, 1923

Mayoralty of New Orleans

City Hall, Sept. 28, 1920.

Calendar No. 6055

No. 5869, Commission Council Series

Whereas the Newton street viaduct was in such condition as was dangerous to life and limb, and

Whereas, the South New Orleans Light and Traction Co., was repeatedly called upon to make this viaduct safe for pedestrian and bicycular travel, and,

Whereas on August 2, 1920, the Commissioner of Public Utilities notified the said Company that the City of New Orleans would place

the said viaduct in repair and charge the cost of said repairs to said railroad company and,

Whereas, on August 3, 1920, the general manager of said company admitted that such work was necessary and the city was justified in taking such steps therefore,

Section 1. Be it Ordained by the Commission Council of the City of New Orleans, that the Commissioner of Public Finances be and he is hereby authorized to pay the bills incurred in the repair of said viaduct amounting to \$6,687.93 as per itemized bills on file in the office of said Commissioner of Public Finances and to charge same to account Municipal Repair Plant, 1920.

Section 2. Be it further Ordained Etc., that the Commissioner of Public Finances and the City Attorney of the City of New Orleans, be and they are hereby directed to take such steps as may be necessary to collect the said amount from the said South New Orleans Light and Traction Co., and when the same shall be paid into the City Treasury to credit said amount to the Municipal Repair Plant, 1920.

Adopted by the Commission Council of City of New Orleans, September 28, 1920.

Jos. B. Norriss, Acting Clerk of Commission Council.

Approved Sept. 28, 1920. Martin Behrman, Mayor.

A true copy. John P. Coleman, Secretary to the Mayor.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

ANSWER—Filed January 27, 1923

Now come the defendants herein, viz.: the Louisiana Public Service Commission, Huey P. Long, Shelby Taylor and Francis Williams, as members of said Commission, through their undersigned special counsel, and Adolph V. Coco, Attorney General of the State of Louisiana, and Wylie M. Barrow, Assistant Attorney General of the State of Louisiana, through Wylie M. Barrow, Assistant Attorney General, and answering the bill of complaint, insofar as they are advised it is necessary to answer the same, say:

I. They admit that the plaintiff is a corporation created, organized and existing under and by virtue of Act No. 37 of the Legislature of the State of Louisiana of 1877, and is and was a citizen and resident of said State in the Eastern District thereof with its domicile in the City of New Orleans, Louisiana.

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II. They admit that the Louisiana Public Service Commission was created and organized, and exists under and by virtue of certain provisions of the Constitution of the State of Louisiana of 1921 and [ol. 41] is a citizen of the said State of Louisiana, having its domicile fixed by law at Baton Rouge, Parish of East Baton Rouge, Eastern District of Louisiana, and that said Commission is presently composed of Huey P. Long, Chairman, Shelby Taylor and Francis Williams, Commissioners.

They admit that Adolph V. Coco is a citizen of Louisiana and President of the City of New Orleans, and is Attorney General of Louisiana.

They admit that Wylie M. Barrow is a citizen of Louisiana and President of the City of Baton Rouge within the Baton Rouge division of the Eastern District of Louisiana, and is Assistant Attorney General of the State of Louisiana, and that he is special attorney for said Louisiana Public Service Commission.

They admit that Huey P. Long is a citizen of the State of Louisiana, resides in Shreveport, in the Western District of Louisiana, and is Chairman of said Commission, and that Shelby Taylor is a citizen of Louisiana, resides in the city of Baton Rouge, in the Baton Rouge division of the Eastern District of Louisiana, and that Francis Williams is a citizen of Louisiana and resides in the City of New Orleans.

III. They admit that plaintiff is now and has been since its organization operating a railroad within the State of Louisiana, and through its connections with other railroads, is a common carrier of freight and passengers within the Eastern District of Louisiana in interstate and foreign commerce.

IV. Upon information and belief, they admit that the plaintiff is the owner of the property described in paragraph IV of the bill of complaint.

V. Defendants, on information and belief, deny that no street or road or roadway has ever been laid out, opened, dedicated, granted or in any other manner acquired across the tract of land as described in paragraph IV of the bill of complaint by the United States America, State of Louisiana, City of New Orleans, or any other political subdivision of said state, or by the public, or by any person, [ol. 42] firm or corporation, except Patterson Street, which is immediately adjacent to the Mississippi River.

They deny that no right to cross said tract of land has ever been granted to, or in any other manner acquired by the United States America, State of Louisiana, City of New Orleans, or any other political subdivision of said state or by the public, or by any person, firm or corporation; but, on the contrary, aver that the plaintiff has admissions in its bill of complaint, and particularly Article VII thereof, alleged, and thereby, judicially admitted, that a right to cross the said tract of land has been specifically granted to the City of New Orleans, it being a political subdivision of the State of Louisiana, and is the granting of a right to the State of Louisiana for the

benefit of the public at large to cross said tract of land as their convenience, safety and comfort demands.

VI. They admit, on information and belief, that the said tract of land together with land adjacent thereto, is now being used and has been used by plaintiff since April 9th, 1878, as the site for its shops, shop yards, railroad yards, and terminals, and that plaintiff has constructed, maintained, and operated thereon, and is now maintaining and operating thereon, shops, shop yards, railroad yards, railroad depot, and other terminal facilities, including a large number of railroad tracks, switches, cross overs, and other such facilities as are customarily found in and are necessary for use in connection with the operation of railroad shops, shop yards, railroad yards, and terminals.

They further admit that the use and operation by plaintiff of the said shops, shop yards, railroad yards, and terminals are necessary to enable plaintiff properly to serve the public and to carry on its business as a common carrier.

Further answering, defendants aver that it is necessary for the public to have a safe, adequate, suitable and convenient crossing over the said tract of land encumbered with its shop, shop yards, railroad yards, railroad depot and other terminal facilities, including [fol. 43] ing railroad tracks, switches, cross overs, etc.

VII. They admit, on information and belief, that the City of New Orleans desired to obtain the right to cross with a viaduct said tract of land between the prolonged lines of Newton Street, which street runs at right angles to the side lines of said tract of land, and that petitioner granted to the said City of New Orleans the right to cross the said tract of land with a viaduct. They further admit, on information and belief, that the ordinance referred to as Ordinance No. 2906, New Council Series, adopted by the Council of the City of New Orleans, on February 28, 1905, and approved by the Mayor of said city on March 1, 1905, named certain conditions accepted by the City of New Orleans for the right granted by the plaintiff to cross the said tract of land with the said viaduct, and that thereafter, namely, in the year 1915, a viaduct for pedestrians was also provided across said tract of land between Patterson Street and the viaduct herein referred to, and that the said pedestrian viaduct at Patterson Street is not involved in this controversy.

Further answering, defendants aver that the granting to the City of New Orleans of the right to cross the said tract of land with a viaduct upon the conditions named in the said ordinance in no manner interferes with the right of the Louisiana Public Service Commission to require in the interest of public convenience and safety the plaintiff to provide a safe and suitable viaduct at Newton Street in Algiers, which is in the Fifth Municipal District of the City of New Orleans, as ordered by said Commission.

VIII. On information and belief, defendants admit that the said viaduct referred to in the said Ordinance No. 2906, New Council Series, in the City of New Orleans, was constructed across said tract

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f land in accordance with the said grant, having been completed about the year 1907, and ever since, has been, and is now being used as a means of crossing plaintiff's said tract of land along the proposed 44] longations of the side lines of Newton Street.

IX. On information and belief, defendants admit that while the negotiations between the plaintiff and the City of New Orleans relative to the city acquiring the right to cross said tract of land by the viaduct, were pending, the said City of New Orleans, by ordinance passed to be advertised, the sale of a franchise for the operation and maintenance of a street railroad in Algiers, being the Fifth District of said city.

The defendants neither admit nor deny the terms of said ordinance, but refer to the same as the conditions named therein, and further answering aver that the said ordinance and any franchise granting to or contract made thereunder with a street railway company in the Fifth District of New Orleans, is entirely immaterial and irrelevant to the issues involved in this case in that the Louisiana Public Service Commission is vested with full, complete and exclusive power to supervise, govern, regulate and control the plaintiff, and to provide by suitable order, rule, or regulation, some adequate, safe and suitable crossing over the tracks and property of the plaintiff company in the manner provided in its order herein contested.

X. For lack of information and belief, defendants neither admit or deny the allegations of paragraph X of the bill of complaint, but in answer to the rule to show cause why a preliminary injunction should not be issued herein as prayed for, defendants deny that the City of New Orleans has recognized its obligation to plaintiff to maintain the said viaduct, but, on the contrary, aver that the said City of New Orleans has absolutely failed to maintain and keep in repair the said viaduct, but, on the contrary, has permitted same to fall into a state dilapidation and decay, which has rendered it unsafe and dangerous, and has condemned the use of the same, all of which is fully shown by the evidence taken before the Louisiana Public Service Commission hereinafter referred to and filed as a part of this answer.

fol. 45] XI. Defendants deny that the South New Orleans Light & Traction Company has heretofore recognized its obligation to the City of New Orleans to maintain said viaduct. Further answering, defendants aver that the alleged contract between the South New Orleans Light & Traction Company and the City of New Orleans is irrelevant and immaterial to the issues in this case, and in no manner stops or bars the Louisiana Public Service Commission from exercising its powers and duties under the Constitution and laws of the State of Louisiana as they have been exercised in its order contested in this case.

XII. For lack of information and belief, they are unable to admit or deny that the said viaduct at Newton Street, if properly maintained and kept in repair, is amply sufficient to care for traffic, foot,

vehicular, street car, and all other kinds, across petitioner's said tract of land along the prolongation of the two sides of Newton Street.

Further answering they aver that the said Newton Street viaduct has not been properly maintained and kept in repair, and in its present condition is not amply sufficient to care for all traffic, foot, vehicular, street car, and other kinds, but on the contrary, is unsafe and dangerous to life and property, is so recognized by the plaintiff, and has been condemned by the City of New Orleans.

XIII. The defendants admit that on the 11th day of November, 1922, the Louisiana Public Service Commission issued an order as set forth in paragraph XIII of the said bill of complaint. Defendants further aver, however, that the said order was not made final on the 11th day of November, 1922, but that subsequently, namely, on the 24th day of November, 1922, at the request of the plaintiff in this case, who was defendant before the said Commission, the Commission granted argument on the application for rehearing, which was heard at a session of the Commission held in the City of New Orleans, at which time the plaintiff's counsel, argued the case before the Commission fully, after which it was taken under advisement for [fol. 46] further consideration. Subsequently, on December 1st, 1922, the said Commission reviewed its order of November 11th, 1922, and issued its final order in the case then before it, which order is not referred to in the bill of complaint and is now attached hereto and made a part hereof as fully as if written in full herein, and identified as Exhibit "A" hereto.

XIV. Defendants deny that the order of November 11th, 1922, herein complained of is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for any of the reasons set forth in bill of complaint, paragraph XIV, or elsewhere therein and particularly deny:

(a) That the said order deprives petitioner of its property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article I of the Constitution of the State of Louisiana adopted in the year 1921, in that it requires petitioner to devote its private property to public purposes without any compensation therefor.

(b) That said order denies to petitioner the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States in that it requires petitioner to devote its private property to public purposes without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana plaintiff's property cannot be taken for said public purposes, except after just and adequate compensation is made therefor, and deny further that the Constitution of the State of Louisiana, authorizing the said Louisiana Public Service Commission to make the order contested in this case, is unconstitutional, null and void, and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

[fol. 47] (c) That said order impairs the obligation of an alleged contract between the City of New Orleans and the plaintiff, under which the said city acquired the right to cross petitioner's said tract of land, in violation of Section 10 of Article I of the Constitution of the United States.

(d) They admit that said Commission, in rendering said order, claims to be acting within the scope of the authority and jurisdiction of Section 4, of Article VI (and not Section 3, as alleged in the bill of complaint) of the State of Louisiana of the year 1921, but deny that neither the provisions thereof, nor any other law of the State of Louisiana confers upon said Commission the power, authority, or jurisdiction to render such an order as is contested herein, and further deny that the said Commission was and is without power, authority or jurisdiction to render the order complained of.

(e) They admit that the said order was rendered after a hearing at which only one member of the Commission was present, but deny that argument was refused to petitioner, and deny that the said order as rendered was in violation of Section 3 of Article VI of the Constitution of the State of Louisiana of 1921, and that said order violates the provisions of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to petitioner the equal protection of the laws and against being deprived of its property without due process of law.

(f) They deny that the said order requires plaintiff to use any part of the public streets of the City of New Orleans which are not now being used by the Newton Street viaduct, and which are not necessary for the building of approaches to either side of the viaduct over the plaintiff's tract of land hereinabove described, and further deny that said Commission is without power, jurisdiction or authority to compel plaintiff to provide a safe and suitable viaduct in the manner required in the order herein contested.

Further answering, defendants aver that the City of New Orleans has heretofore permitted the use of its streets on either side of the plaintiff's tract of land over which the Newton Street viaduct now extends and over which the viaduct to be provided under — of the Com-[fol. 48] mission must extend, and that the said street being a public highway leading to the tract of land over which the viaduct is ordered to be provided, is a public highway, part of the general system of streets and highways of the State of Louisiana, the same is and may be used for the purpose of providing, in accordance with the valid order of the Commission, a safe, suitable and adequate viaduct.

(g) Defendants deny that the said order releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans if such obligation exists, to maintain all parts of the viaduct constructed by the City of New Orleans, if and insofar as any contract may exist between the City of New Orleans and the plaintiff company, binding upon the City of New Orleans.

Further answering, defendants aver that the alleged contract between the South New Orleans Light & Traction Company and the City of New Orleans is irrelevant and immaterial to the issues herein involved insofar as the said order of the Commission is concerned, and further aver that the said alleged contract in no manner estops or bars the State of Louisiana, through the Louisiana Public Service Commission, to exercise the police power, by requiring the plaintiff company to provide a safe, suitable and adequate crossing over the said tract of land.

(h) They deny that the said order is unjust, arbitrary, and unreasonable, and that there is no public necessity therefor in that a viaduct already exists on the site designated in the order complained of for any of the reasons stated in paragraph (h), page 8 of the bill of complaint.

Defendants, further answering, aver that paragraph (h) of the bill of complaint plainly admits that the viaduct which exists on the site designated in the order of the Commission is not maintained and repaired as it should be, and defendants further aver that the said viaduct is admitted by engineers, superintendents, and other employees of the plaintiff company to be unsafe and dangerous, and, therefore, unfit for use. They aver that the order in contest requires that the plaintiff company shall "provide a safe and suitable traffic viaduct over and across plaintiff's tracks, facilities and properties in the Fifth District in the City of New Orleans (Algiers) in accordance with the plans to be filed with the Commission within thirty days. That the said order of the Commission permits the plaintiff company to provide a safe and suitable viaduct either by repairing and rebuilding the present viaduct, or providing a new viaduct, and that the plaintiff has made no effort to comply with the said order in any manner whatsoever, either by submitting plans to the Commission for its approval, or by proceeding to repair and maintain in a safe and suitable condition the existing viaduct. Defendants deny that the order of the Commission is in violation of Amendment Fourteen to the Constitution of the United States in that it deprives the petitioner of its property without due process of law by requiring it to "provide a safe and suitable traffic viaduct over and across its tracks".

(i) Defendants deny that the said order constitutes the taking of plaintiff's property without compensation for the benefit of the South New Orleans Light & Traction Company in violation of the Fourteen Amendment of the Constitution of the United States, and Section 2 of Article IV of the Constitution of the State of Louisiana.

XV. Defendants admit that the plaintiff has not filed with the said Commission the plans and specifications referred to in the said order, and they further admit that the said Commission has ordered the plaintiff to show cause on or before January 23rd, 1923, why they should not be fined for failure to do so.

Further answering, they aver that no fine has been imposed, and that this court is without jurisdiction to issue an injunction restraining the Commission from proceeding under a rule to show cause to

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termine whether or not a fine shall be imposed against the plaintiff for failing to file the plans and specifications as required in the said order.

[p. 50] XVI. They deny that the imposition of fines and penalties on the plaintiff for not having obeyed the order of the Commission would be contrary to the Constitution of Louisiana and of the fourteenth Amendment to the Constitution of the United States, that the imposition of the penalties provided in the Constitution of Louisiana would deprive petitioner of its property without due process of law.

XVII. They deny that the cost to the petitioner of complying with the order of the Commission of November 11th, 1922, would be greatly in excess of \$150,000.00. They aver that whatever may be the cost of complying with the Commission's order is *damnum sine injuria*.

XVIII. They admit that the controversy is between citizens of the same state and deny that the Constitution and laws of the United States are in any manner violated.

XIX. They admit that the said Commission will, if the plaintiff fails to comply with its said order, prosecute plaintiff for failure therein, but deny that petitioner will be subject to multitudinous vexatious suits.

X. They deny that for any of the reasons set forth in the bill of complaint, immediate and irreparable loss will result to plaintiff, and they deny that the injunction either temporary or final as prayed for, is necessary, proper, or equitable, and that plaintiff is entitled to the same.

XI. Further answering, defendants aver that before entering its order of November 11th, 1922; a full, fair and impartial hearing was granted to the plaintiff, and that plaintiff took part in the same, cross-examined witnesses, introduced its own evidence, made objections to the testimony offered, all of which were recorded and reduced to writing by a competent stenographer employed by the Commission, and that in addition to the oral testimony given by numerous witnesses, a number of documents, exhibits and statements were filed, all of which were preserved by the Commission in its docket in the proceedings before it.

The defendants further aver that all of the members of the said Commission were furnished with copies of the said evidence, that they considered the same, and that the order herein contested was in accordance with the evidence. Certified copies of the proceedings before the Commission, including a transcript of the testimony taken, all of the exhibits, and motions, filed, and extracts from the minutes of the Commission, are hereby attached hereto as Ex- "B" and made a part of this answer as fully as if written in herein.

Wherefore, the defendants, each having answered the bill of complaint and the rule to show cause why an interlocutory injunction should not be issued herein, pray that plaintiff's demands be rejected; that the prayer for interlocutory injunction be denied; that the prayer for final injunction be denied; that the bill of complaint be dismissed for want of equity, with costs and reasonable attorney's fees, and for all such general and equitable relief as to the court may seem meet and proper.

Louisiana Public Service Commission and Huey P. Long, Chairman, Shelby Taylor and Francis Williams, Members thereof, (Signed) By W. M. Barrow, Special Counsel, Francis Williams, Assistant Counsel, Adolph V. Coco, Attorney General of the State of Louisiana and Wylie M. Barrow, Assistant Attorney General of the State of Louisiana, By W. M. Barrow, Assistant Attorney General.

[fol. 52] Affidavit of Francis Williams to above paper omitted in printing.

[fol. 53] EVIDENCE: EXHIBIT 1A. PUBLIC SERVICE COMMISSION ORDER No. 84—Filed January 27, 1923

Secretary's certificate to following order omitted in printing.

[fol. 53 1/4] LOUISIANA PUBLIC SERVICE COMMISSION

Order No. 84

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP CO.

In re Newton Street Viaduct, Algiers

On November 11, 1922, the Commission adopted its Order No. 82, requiring the Morgan's Louisiana and Texas Railroad and Steamship Company to provide a safe and suitable traffic viaduct over its tracks and properties in the Fifth District of New Orleans, commonly known as Algiers, the said viaduct, in effect, to be a continuation of Newton street, passing over the tracks and properties of the defendant.

In due course an application for rehearing was filed by the defendant, alleging various reasons why a rehearing should be granted and thereafter our Order No. 82 recalled and annulled and the proceeding dismissed. The Commission granted argument on the application and the same was heard at a session of the Commission held in New Orleans on November 24, 1922, all parties to the proceeding having been previously notified. The Commission has listened carefully to the arguments presented by counsel for the de-

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endant, but it fails to find ground in the record as made for the reversal or modification of its previous decree. On the other hand, during the course of the arguments on the application for rehearing the Commission's attention was directed by counsel for one of the parties at interest to a provision of the charter of the Morgan's Louisiana and Texas Railroad and Steamship Company which we think effectually sets at rest all contention over the liability of the defendant herein to provide the viaduct required by our Order No. 2, Act No. 37 of the General Assembly of the State of Louisiana of 1877, approved March 8, 1877, being

"An Act to incorporate the Morgan's Louisiana and Texas Railroad and Steamship Company."

Section 7 thereof provides:

"To construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, watercourses, river, lake bay, inlet, street, highway, turnpike or canal, within the state of Louisiana, which the course of said railways may intersect, touch or cross; provided the said company shall preserve any watercourse, street, highway, turnpike or canal, which its said railways may pass upon, along or intersect, fol. 531₂] touch or cross, so as not to impair its usefulness to the public unnecessarily, or, if temporarily impaired, in and during the construction of the said railroads, the said company shall restore the same to its former state, or to such a state that its usefulness to the public shall not be unnecessarily impaired or injured * * *"

Of this legislative act the Commission can and does take judicial cognizance; and, the necessity for a viaduct at the point in question having been clearly established, we are of the firm opinion that the very charter of the defendant places upon it the burden of supplying this essential facility.

For these reasons, therefore, it is

Ordered, That the application of Morgan's Louisiana and Texas Railroad and Steamship Company for a rehearing on the Commission's Order No. 82 be and the same is hereby denied; and it is further

Ordered, That the Commission's Order No. 82, adopted November 1, 1922, be and the same is hereby ratified and affirmed and re-adopted; and it is further

Ordered, That the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans (Algiers); the said viaduct herein ordered to commence at a point on Newton Street, Algiers, at a sufficient distance from the properties of the Morgan's Louisiana and Texas Railroad and Steamship Company to provide suitable and proper grades for traffic thereover; all to be in accordance with plans and specifications which are hereby required to be filed with this Commission

for its approval within thirty days from November 11, 1922; and it is further

Ordered, That within ninety days from the date of the approval of the plans herein required to be filed by this Commission that the said Morgan's Louisiana and Texas Railroad and Steamship Company complete and open for traffic to the public the viaduct herein required.

By order of the Commission.

Baton Rouge, Louisiana, December 1, 1922.

Huey P. Long, Chairman. Shelby Taylor, Commissioner.
Francis Williams, Commissioner. Henry Jastremski, Secretary. (Seal.) Attest: A true copy. Henry Jastremski, Secretary.

[fol. 54] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

MOTION TO DENY TEMPORARY INJUNCTION AND DISMISS BILL OF COMPLAINT—Filed Jan. 27, 1923

Now come the defendants herein, through their undersigned counsel, and on suggesting to the Court that,

(1) The only order contested in the bill of complaint is Order No. 82, adopted by the Louisiana Public Service Commission on November 11th, 1922, and no other,

(2) That the said order never became final, but that subsequently to its date, on plaintiff's petition, the entire matter concerning the providing of a safe and suitable traffic viaduct in the Fifth Municipal District of the City of New Orleans, (Algiers), was the subject of further proceedings before the said Commission,

(3) That on November 24th, 1922, argument before the entire Commission was held in said proceedings,

(4) That on December 1, 1922, the said Commission after further consideration, adopted its final order in the said case, which is its Order No. 84, dated December 1, 1922, copy attached, and which order No. 84 is not in full force and effect, and is not contested herein by the plaintiff,

(5) That therefore, the plaintiff not having contested the said Order No. 84, of said Commission, dated December 1, 1922, the granting of a temporary injunction against said Order No. 82, of November 11, 1922, would leave the said Order No. 84, of December 1, 1922, in full force and effect, and would therefore be vain and useless, in as much as said Order No. 84 is legal, valid and binding against plaintiff,

[fol. 55] (6), And further, that one of plaintiff's principal complaints against said Order No. 82, of November 11, 1922, is that it was adopted without argument being granted before the entire Commission, which is not true of Order No. 84, of December 1, 1922,

Moves, that the temporary injunction and the final injunction as prayed for in the bill of complaint, be denied, and that the bill of complaint herein filed be dismissed as trivial, wanting in equity, vain and useless, for costs and for reasonable attorney's fees for the Louisiana Public Service Commission, and Huey P. Long, Shelby Taylor and Francis Williams, members thereof.

Louisiana Public Service Commission and Huey P. Long, Chairman; Shelby Taylor, Francis Williams, Members.
(Signed) By W. M. Barrow, Special Counsel; Francis Williams, Assistant Counsel A. V. Coco, Attorney General of Louisiana; Wylie M. Barrow, Assistant Attorney General, of Louisiana, By W. M. Barrow, Assistant Attorney General.

[fol. 56] NOTE.—The exhibit which was hereto attached, being an order No. 84, same as the exhibit attached to the answer.

[fol. 57] NOTE.—

Ordinance No. 2906, N. C. S., same as Exhibit A attached to Bill.

"	"	2510,	"	"	"	"	B	"	"	"
"	"	2561,	"	"	"	"	C	"	"	"
"	"	3792,	"	"	"	"	D	"	"	"
"	"	3996,	"	"	"	"	E	"	"	"
"	"	5869,	C. C. S.,	"	"	"	F	"	"	"

[fol. 58] EXHIBIT IN EVIDENCE—Filed January 27th, 1923

on. Paul H. Maloney,
Commissioner of Public Utilities,
City.

DEAR SIR:

I have your letter of March 4, 1922, in which you state that the Southern New Orleans Light & Traction Company, assignee of the franchisees of the franchise adjudicated under the provisions of Ordinance No. 2510 N. C. S. (amended by Ordinance No. 2561 N. C. S.) has petitioned the Council to set aside its franchise obligation to maintain the Newton Street viaduct, the attorney for said company contending that Ordinance No. 3996 N. C. S. relieves the company of said obligation.

In compliance with your request that I investigate the matter and advise you as to the city's rights in the premises, I beg to say:

Ordinance No. 2510 N. C. S. as amended by Ordinance No. 2561 N. C. S., provides for the sale of a franchise for the operation of a

street railway in Algiers. This franchise was adjudicated to Messrs. Leigh Carroll and Lynn H. Dinkins, who accepted it by notarial contract before Wm. V. Seeber, city notary, March 1, 1905. The said ordinance and contract provide that the said street railway shall be constructed maintained and operated through certain streets in Algiers and, particularly, "along Newton Street, crossing the tracks of the Morgan's Louisiana & Texas R. R. & S. S. Co. on a viaduct that the city guarantees to provide," that

"the purchaser shall pay in cash to the city, as compensation for that part of the viaduct which is to be used by the purchaser as part of its roadbed an amount equal to one-third the cost of the viaduct over the tracks of the Morgan, Louisiana & Texas R. R. & S. S. Co., provided, that the cost of the viaduct shall not exceed \$40,000. Should the cost of the viaduct amount to more than \$40,000, the purchaser shall not be liable for nor will he be required to contribute more than \$13,333.33 on account thereof. Payment by purchaser shall be made within sixty days after completion of the viaduct.

"The purchaser shall, in addition to contributing to the cost of the above described viaduct, be obligated to and he shall maintain all parts of said viaduct in good condition satisfactory to the City Engineer and Commissioner of Public Works, throughout the term of the franchise."

The said ordinance also provides that the successful bidder shall furnish a bond in the sum of \$10,000 for the faithful compliance by him with all the terms, conditions, specifications and provisions of the ordinance and this bond was furnished in the contract of March 1, 1905, aforesaid.

Ordinances Nos. 3792 N. C. S. and 3996 N. C. S. provide for the transfer of this franchise from the original grantee to the assignee named above.

Ordinance No. 3792 N. C. S. assents to the transfer upon the condition that the assignee shall be bound by all of the terms, conditions and obligations of said franchise and contract, with the modification, among others not pertinent to this inquiry, that the assignee shall construct the street railway over the viaduct, as finally located, within five years from date.

Ordinance No. 3996 N. C. S. refers to Ordinance No. 3792 N. C. S. which it supplements and releases the bond above referred to, provides a substitute bond therefor, fixes the time within which the assignee shall pay for the use of said viaduct and construct its railway over same, grants a right of way in addition to that granted by Ordinance No. 2510 NCS, fixes a time for completion of the railway, relieves the assignee of an obligation to construct and operate that part of the railroad on Pacific Ave. from Opelousas Ave. to Newton St. and authorizes the assignee to mortgage the franchise. Except for the above mentioned release of the original bond and the above mentioned release of the obligation to construct and operate the railroad on Pacific Ave. between Opelousas and Newton

Sts., this ordinance No. 3996 NCS does not relieve the assignee of any of the obligations imposed by the original ordinance.

In view of the above findings, I advise that it is my opinion that the original franchise obligation "to maintain all parts of said viaduct in good condition satisfactory to the City Engineer and Commissioner of Public Works, throughout the term of the franchise," was not released by ordinance No. 3996 NCS and is still in full force and effect.

Further it is my opinion, that because of the constitutional provisions that the Legislature shall have no power to authorize the releasing of the obligation of any corporation to any municipality (now found in Sec. 13 Art. IV, Const. 1921), the City of New Orleans is without power to gratuitously release the Southern New Orleans Light & Traction Co. from its aforesaid obligation to maintain the Newton street viaduct.

I may add that while the city may not gratuitously release the company from said obligation, it may, I believe, do so for a consideration, which consideration may be either cash or an obligation to do other things in lieu of the maintenance of the viaduct.

I trust that the foregoing covers the questions you have in mind. If not, I will consider the matter further upon receipt of information as to the specific points regarding which you desire to be advised.

Very truly yours, Ivy G. Kittredge, City Attorney.

This is a true and correct copy of the original, which is in the files of this department.

(Signed) Paul H. Maloney, Com'r Pub. U.

[fol. 60]

EXHIBIT IN EVIDENCE

Conveyance Office

4/864. Fee One Dollars. Received payment Jan. 25, 1923.
W. Maurice Cain, R. C., per ———.

STATE OF LOUISIANA,

Parish of Orleans:

Office of the Register of Conveyances

Note.—The Register of Conveyances will not be responsible for the record of any acts of sales inscribed in book No. 17, of this office, the same having been lost or stolen previous to his taking possession of the office of Register of Conveyances. Also Books 122 and 125 and their respective indices, the same being mutilated and dilapidated.

New Orleans, Jan'y. 25th, 1923—9 a. m.

The undersigned Register of Conveyances, for the Parish of Orleans, hereby certifies that according to the indices, of this office it

does not appear that the following described property has been alienated by

Charles Morgan

M. 273, R. C.

A certain tract of land situate in the Parish of Orleans on the right bank of the Mississippi River in the Fifth District of the City of New Orleans, measuring three hundred and seventy-five feet front on the Mississippi River, by twenty four arpents in depth between parallel lines, bounded above by what was formerly a street fifty three feet wide called Verret Avenue separating said tract of land from the land now or heretofore of the Brooklyn Warehouse Company and below by a street called Thayer Avenue separating said tract of land from the remainder of a tract of land belonging to F. Verret, together with wharves, depots, machine shops and other buildings and improvements thereon.

Acquired July 31, 1869, up to April 9, 1878, Registered in Conveyance Office Book 109 folio 449 et seq.

Except

Sale Dated April 9, 1878 to Morgans Louisiana and Texas Railroad and Steamship Company. Before Andrew Hero, C. O. B. 109-Folio 449.

(Signed) Chas. Cain, D. R.

[fol. 61]

EXHIBIT IN EVIDENCE

Conveyance Office

4/864. Fee One Dollars. Received payment Jan. 25, 1923. W. Maurice Cain, R. C., per ———.

STATE OF LOUISIANA,

Parish of Orleans:

Office of the Register of Conveyances

NOTE.—The Register of Conveyances will not be responsible for the record of any acts of sales inscribed in book No. 17, of this office, the same having been lost or stolen previous to his taking possession of the office of Register of Conveyances. Also Books 122 and 125 and their respective indices, the same being mutilated and dilapidated.

New Orleans, Jan'y 25th, 1923—9 a. m.

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Charles Morgan

A certain tract of land situate in the Parish of Orleans on the right bank of the Mississippi River in the Fifth District of the City of New Orleans, measuring three hundred and seventy-five feet front on the Mississippi River, by twenty four arpents in depth between parallel lines, bounded above by what was formerly a street fifty three feet wide called Verret Avenue separating said tract of land from the land now or heretofore of the Brooklyn Warehouse Company and below by a street called Thayer Avenue separating said tract of land from the remainder of a tract of land belonging to F. Verret, together with wharves, depots, machine shops and other buildings and improvements thereon.

Acquired from Charles Morgan by act before Andrew Jr. April 9, 1878, Registered in Conveyance Office Book 109 folio 449 et seq.

Except

Indenture Meh. 10th, 1903, between Dana A. Rose and Morgan's Louisiana & Texas Rail Road & Steamship Co. lots No. 4-5, C. O. B. 192 folio 200 as to this exceptions above property and property described in this book & folio is not clear. Therefore same is placed hereon as a protection to this Office.

(Signed) Chas. Cain, D. R.

[fol. 62]

EXHIBIT IN EVIDENCE

Sale of Property by Charles A. Barnard to South New Orleans Light and Traction Company

UNITED STATES OF AMERICA,

State of Louisiana,

Parish of Orleans, City of New Orleans:

Be it known, that on this 26th day of the Month of March, in the year of our Lord, one thousand nine hundred and seventeen (1917), and of the Independence of the United States of America, the one hundred and forty-first, before me, Arthur B. Leopold, a Notary public, duly commissioned and qualified, in and for this City and the Parish of Orleans, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Charles A. Barnard, of full age and a resident of the City of Montreal, Province of Quebec, Dominion of Canada, who declared that he does by these presents, grant, bargain, sell, convey, transfer, assign, set-over, abandon and deliver, with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which he has or may have against all preceding owners and vendors, unto South New Orleans Light & Traction Company, a corporation domiciled in the City of New Orleans, and chartered and organized under the laws of the State of

Louisiana, by an Act passed before the undersigned Notary, and recorded in the Mortgage Office Book 1296, folio 451 herein represented by E. W. Burgis, of lawful age, and a resident of the City of New Orleans, the President of said South New Orleans Light & Traction Company, under and by virtue of a resolution of the Board of Directors of said Corporation passed at a meeting thereon held in its office in this city, on the — day of March 1917, a duly certified copy of which resolution is hereto attached, and made part herof; here present accepting and purchasing for said South New [fol. 63] Orleans Light & Traction Company, its legal representatives, successors, and assigns, and acknowledging due delivery and possession thereof, all and singular the following described property, rights, privileges, and franchises,

(1) A certain franchise or right to operate electric or other cars in the City of New Orleans, sold by the Comptroller of the City of New Orleans, on November 21, 1904, as more fully set out and described in a certain notarial contract entered into before Wm. V. Seiber, City Notary Public, by and between the Mayor of the City of New Orleans, and Leigh Carroll and L. H. Dinkins, on the 1st day of March, 1905, and from them acquired by said Algiers Railway & Lighting Company, which contract is hereby referred to for greater certainty.

Also a certain franchise, or right to operate electric or other cars in the Parish of Jefferson, sold by the President of the Police Jury of the Parish of Jefferson, on the 18th day of February 1905, as more fully set out and described in a certain notarial contract entered into before John R. Langridge, Notary Public, in and for the Parish of Jefferson, on the 27th day of June 1905, between the President of the Police Jury of Jefferson Parish, and Leigh Carroll and L. H. Dinkins, and from them acquired by said Algiers Railway & Lighting Company, which said contract is hereby referred to for greater certainty.

Also all the rails, ties, road-beds, poles, wires, motors, cars, motor-generators, and switchboards, car barn, tools and other apparatus and equipment, all constituting the railway and its equipment, extending from Copernicus Avenue in the town of Gretna, Jefferson Parish, to a point on the Mississippi River, known as the Immigration Station, with its various branches, switches, turnouts, and constructed under the above mentioned franchises.

Also eighty of the second mortgage bonds of the Algiers Water-works & Electric Company, each for the sum of \$1,000, numbered from 101 to 180 both numbers inclusive, dated December 31, 1902, and payable on the 1st day of December 1925, with interest at the rate of 6 per cent, payable semi-annually, as per coupons attached, said bonds having all coupons attached, except those maturing prior to December 2, 1905.

Also one thousand shares of the capital stock of the Algiers Water-works & Electric Company, or so many thereof as may be acquired by said Company, together with all property, real, personal and mixed, all contracts, franchises, rights, privileges and appurtenances

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thereto, growing out of and by reason of the ownership of said shares of stock in the Algiers Waterworks & Electric Company.

§ 64] (2) All of the property and assets formerly owned by the Algiers Waterworks & Electric Company, including real estate, engines, boilers, pumps, machinery, of all kinds, poles, lines, wires and through the streets of New Orleans, McDonoghville, and Metairie, in the Parishes of Orleans and Jefferson, Louisiana, as now constituted whether formerly owned solely by said Algiers Waterworks & Electric Company, or jointly with it with the New Orleans Railway & Light Company, meters, contracts, accounts, rights, and franchises, both in the City of New Orleans, and the Parish of Jefferson, and all of its other assets and property of every kind and nature whatsoever, the said real estate being described as follows:

Thirteen certain lots of ground, with all improvements thereon and all the rights, ways, servitudes, privileges, and advantages, thereto belonging, situated in the Fifth Municipal District of the City of New Orleans, in square No. 42, (bound by Pacific Avenue, Elmira Avenue, Thayer Street (also known and called Delaronde Street), and Pelican Avenue (formerly known as Peter Street)), said lots being designated by the Nos. 9, 10, 11, 12, 13, 14, 15, 20, 21, 22, 23, 24 and 25, on a plan by W. T. Thompson, surveyor, dated March 7, 1849, and measuring as follows, to-wit:

Lot No. 9, forms the corner of Thayer Street and Elmira Avenue, and measures twenty-eight feet front on Thayer Street, by one hundred and twenty feet in depth and front on Elmira Avenue.

Lots Nos. 10 to 15 inclusive, adjoin each other and measure each fifty feet, six inches and six and three-fourth lines front on Elmira Avenue, by a uniform depth between parallel lines of one hundred and twenty-three feet, eight inches.

Lots Nos. 20 to 25, inclusive, adjoin each other and measure each thirty feet six inches and six and three-fourths lines front on Pacific Avenue, by a uniform depth between parallel lines of one hundred and twenty-three feet and eight inches; all measurements being more or less.

Excepting, the portion thereof having front of forty-five feet on Pacific Avenue and a uniform depth between parallel lines of ninety feet and being the front portion of lot No. 25 and the adjoining fourteen feet five inches and five and four-fourth lines of the front portion of lot No. 24, and also excepting a certain servitude or right of way from Elmira Avenue to the stand-pipe located upon parts of said lots 25 and 24, the same being ten feet in width through and over portions of lots Nos. 11 and 25; both of said exceptions being the property and right of

the City of New Orleans, by act passed before Omer Villere, late a Notary Public, on November 12, 1907, a particular sketch annexed to said act so granted to said City of New Orleans.

(3) An additional franchise sold and granted to the Algiers Railway & Lighting Company, by the City of New Orleans, on October 18, 1911, pursuant to the provisions of Ordinance 7151, New Orleans Council Series, for a street railway on Newton Street, from Teche

Street to Pacific Avenue, and on Elmira Avenue from Newton Street, to Opelousas Avenue, and on Opelousas Avenue from Elmira Avenue to Pacific Avenue.

[fol. 65] (4) Lots A, B and C, in square No. 42, in the Fifth District of the City of New Orleans, bounded by Pacific, Elmira and Pelican Avenues, and Thayer Street, which three lots measure together eighty-eight (88) feet front on Pacific Avenue, by one hundred and nine feet, eight inches, in depth and form the corner of Pacific Avenue and Thayer Street.

Lot No. 5, and part of Lot No. 6, in square 42, lot No. 5, measuring twenty-seven feet, five inches front on Thayer Street, and the east portion of lot No. 6, measuring seventeen feet seven inches front on Thayer Street, of the uniform depth of one hundred and twenty (120) feet, between parallel lines.

Lot No. 1, in square 43, bounded by Patterson and Thayer Streets, and Pacific Avenue and Elmira Avenue, which lot No. 1 forms the corner of Patterson Avenue and Pacific Avenue, and measures twenty-seven feet six inches on Patterson street by a depth between parallel lines of one hundred and seventy-eight feet, four inches.

Lot No. 11, in square 160, bounded by Elmira and Pacific Avenues, and Newton and Homer Streets, which lot forms the corner of Elmira Avenue and Newton Street, and measures thirty-two feet front on Elmira Avenue by a uniform depth between parallel lines of one hundred and twenty-three feet, eight inches. This lot is recorded in the Conveyance Office, of this Parish, book 249, folio 310.

(5) A certain lot of ground, situated in the town of Brooklyn, in the Parish of Jefferson, State of Louisiana, and designated by the lot number five (5) of the square number two (2), Bass Division, bounded by Ocean Avenue, Water Street, New Public Road and on the upper side of the line of the Weis and Gumbel property, on a plan of survey made by H. L. Zander, engineer and surveyor, for Police Jury, Parish of Jefferson, on July 29, 1913, and according to which plan said lot begins at a distance of one hundred and twenty feet from the corner of Water Street, and has a frontage of thirty feet on Ocean Avenue by one hundred and forty-six feet, one inch and three lines, in depth between parallel lines, on line of lot four, towards Water Street one hundred and forty-six feet in depth on line of lot number six (6) towards New Public Road, and thirty feet in the rear adjoining the property of Weis and Gumbel.

(6) A certain strip or portion of ground in the Fifth District of the City of New Orleans, taken from the side of the property of the present owner adjoining the lower side of London Street, said strip of ground commencing at the public road, along Mississippi River, measures fifteen feet on the public road, and extending in depth between parallel lines to the river side of Lapeyrouse Street.

(7) A certain strip or portion of ground twenty-five feet in width and about two arpents in length, in the Fifth District of the City of New Orleans, in the rear part of the property designated as the

Leonhard place or plantation, and between said plantation proper and the pasture lands of same.

[fol. 66] Said strip begins at the termination of General Meyer Avenue at the intersection of Merrill street and runs at right angles from Merrill street through the said Leonhard place to the line of property belonging to Frank Pace, heirs or assigns.

Being a portion of the lands now described on the assessment rolls of New Orleans as lot No. 12, plantation property.

(8) All of the real estate and physical property of the Algiers Railway & Lighting Company, together with all the franchises, rights, appurtenances and assets of every kind, or nature whatsoever, and more particularly described as follows to-wit:

(a) All the property, real, personal and mixed, rights, privileges, franchises, rights of way, contracts, emoluments, revenues, stocks and bonds and other securities now owned or hereafter acquired by said corporation and more particularly set out and described as follows: All its lands, buildings, steam and electric plant and system, electric railway plant and system, its poles, lines, wires, lights, its stocks and bonds, and all things in action, claims and demands. All its rights, contracts, privileges, rights of way, franchises, and appurtenances, growing out of or appertaining to said property, whether now possessed or hereafter acquired all the rights, title and interests, estate, property, claim and demand, whatsoever, as well as in law as in equity, of said corporation in and to the same and every part thereof, and that of its franchises, privileges, and appurtenances.

Also all property of every name and nature whatsoever, situated not particularly hereinbefore described or referred to, belonging to said Algiers Railway & Lighting Company, or in and to which it has any estate, right, title, possession, claim or demand, whatsoever, without excluding from the generality of this description any property whatsoever because of specifications in other parts of this description of any other particular property, or class of property, and including also any other properties which the court may hereafter find or decree to be the property of said Algiers Railway and Lighting Company, and to be subject to the first mortgage hereinbefore referred to.

Being the same property acquired by Charles A. Barnard, the vendor from D. B. H. Chaffe, Special Master, and the Algiers Railway & Lighting Company, on March 21st, 1917, by Act under private signature, duly acknowledged and recorded in Conveyance Office Book 290 folio 211; and original of which said acquisition, sale, transfer and assignment is hereto annexed, made part hereof for greater certainty.

To have and to hold the above described property, rights, privileges, and franchises, unto the said purchaser, South New Orleans Light & Traction Company, its successors and assigns, forever.
[fol. 67] This sale is made and accepted for and in consideration of fifteen hundred (1,500) shares of the capital stock of the South

New Orleans Light & Traction Company, of the par value of One Hundred (\$100) Dollars each, full paid and non-assessible, which the said purchaser, has well and truly paid and delivered to the vendor, who hereby acknowledges receipt therefor, and grants full acquittance and discharge therefor, together with other valuable considerations, premises, undertakings and agreements, more fully set out in certain resolutions adopted by the Board of Directors of said corporation, vendee, on March —, 1917, here referred to for greater certainty, made part hereof.

The purchaser, South New Orleans Light & Traction Company, hereby assumes all debts, obligations, undertakings, and liabilities, which, by the provisions, conditions and terms of a certain decree, made part hereof, of the United States District Court for the Eastern District of Louisiana, entered on November 3rd, 1916, in a certain cause entitled Charles A. Barnard vs. Algiers Railway & Lighting Company, No. 15,475, of the docket of said Court, the said Charles A. Barnard, was required to assume to the extent that the said Charles A. Barnard was thereby required to assume the same by the terms and conditions of said decree provided and imposed to be performed by him as and to the extent therein provided.

According to the annexed certificate of the Register of Conveyances, in and for the Parishes of Orleans and Jefferson, State of Louisiana, it does not appear that the property herein conveyed has been heretofore alienated by the present vendor.

The certificate of the Recorder of Mortgages, for the Parishes of Orleans and Jefferson, as well as Tax research certificates are hereby specially dispensed with by the parties hereto, and the undersigned Notary, and the surety on his official bond are held harmless in the premises.

[fol. 68] The vendor declares that all taxes up to and including the year 1916 have been paid, and particularly all taxes for the years 1914, 1915 and 1916, as will appear from the tax receipts showing payment thereof, hereto annexed — made part hereof. The purchaser assumes payment of the taxes for the year 1917.

The said Charles A. Barnard, vendor herein, declares under oath that he was married but once, and then to Marie La Mothe, who is now living and residing with him in the City of Montreal, Canada.

Thus done and passed, in triplicate originals, in my office, at the City of New Orleans, on the day, month and year herein first above written, in the presence of Gerald Netter and R. Kahrs competent witnesses, who hereunto sign their names with the said appearers and me, Notary, after reading of the whole.

(Original Signed) C. A. Barnard, E. W. Burgess, Witnesses:
Gerald Netter, R. Kahrs, Arthur B. Leopold, Notary Public. Reg. C. O. B. 291, fo. 224, 3/26/17.

[fol. 69] Affidavit of A. B. Leopold to above paper omitted in printing.

[fol. 70]

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EXHIBIT IN OFFICE

New Orleans, La., February 7, 1905.

On motion the following resolution was passed:
 Whereas There has been submitted to this Board the letter written
 E. B. Cushing, General Superintendent, to the Honorable Mayor
 Council of the City of New Orleans, dated January 25th, 1905,
 reference to the construction of a viaduct over the property and
 lands of this Company, along the line of extension of Newton street
 Algiers, and connecting to the construction, location and main-
 tenance of said viaduct, but upon conditions stated therein.
 It is resolved, That the action of E. B. Cushing in the premises be
 approved and ratified, and the consent of the Company to the erec-
 tion, maintenance and construction of said viaduct is hereby given
 on the conditions stated in said letter of January 25th, 1905.

H. McCloskey, Chairman.

Affidavit of G. R. Herbert to above resolution omitted in printing.

71] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HERMAN H. UECKERT—Filed January 27, 1923

STATE OF LOUISIANA,
 Parish of Orleans:

Personally came and appeared before me, the undersigned au-
 thority duly commissioned and qualified, Herman H. Ueckert, who
 having been by me first duly sworn did depose and say:
 I am now, and for many years past have been in the employ of the
 Morgan's Louisiana & Texas Railroad & Steamship Company as
 Supervisor of Structures, and as such it has been my duty to design
 and check the design of the bridges, buildings and all other classes
 of structures and to estimate the cost to construct same and thereafter
 check the actual cost against said estimates.
 During my experience in doing such work I can conservatively
 state that I have designed, checked the design of, estimated the cost
 and thereafter checked the cost of hundreds of buildings and
 structures. I consider myself an expert in such matters and am
 well considered. I hold the Master's Degree as Civil Engineer, hav-
 ing graduated as such from the Agricultural & Mechanical College
 at Texas in the year of 1897 and have practiced my profession since
 that time.

I personally approved, on behalf of the Morgan's Louisiana &
 Texas Railroad & Steamship Company, the plan for the clearance of
 the present viaduct across the shop yards and yards of that
 company at Algiers between the prolongation of the two sides of
 Common Street and for many years past I have been personally fa-

miliar with said present viaduct, having on innumerable occasions inspected same.

During the course of the performance of the duties of my office I am frequently required to be in the shops and yards of the Company at Algiers and on such occasions and also during the occasions on which I was actually inspecting said viaduct I have had occasion to note the traffic making use of said viaduct. I am familiar with the size, location and method of construction of said viaduct. It is located between the prolongation of the two sides of Newton Street. It is 1,491 feet long between the abutments, 30 feet wide between the side walks; side walk on each side being 5 feet wide, and supported on 81 bents of three columns, each with concrete abutments at each end and concrete retaining walls on each side of the approaches. The approaches on each end of the structure above described consist of an earth fill 211 ft. 2 in. long on the lower end and 217 ft. 6 in. on upper end.

Newton Street is 42 feet wide so that the present viaduct with the said side walks on each side of the road-way occupies all of the space between the prolongation of the two sides of Newton Street except two feet and it would be impossible for the Morgan's Louisiana & Texas Railroad & Steamship Company to provide a suitable viaduct over its tracks, facilities and properties in the 5th District of the City of New Orleans (Algiers) said viaduct to commence at a point on Newton Street a sufficient distance from the properties of the company to provide suitable and proper grades for traffic thereover without removing the present viaduct at said point hereinabove referred to. The cost of a safe and suitable viaduct over and across the tracks, facilities and properties of the Morgan's Louisiana & Texas Railroad Company in the 5th District of the city of New Orleans (Algiers) said viaduct to commence at a point on Newton Street at a sufficient distance from the properties of the Company to provide suitable and proper grades for traffic thereover would cost in excess of the sum of One Hundred and Fifty thousand (\$150,000.00) Dollars. The cost to repair the present viaduct due to the fact that said present viaduct has not been properly maintained during the past several years would be approximately Fifty one thousand six hundred *dollars* (\$51,600.00) Dollars. If the present viaduct is repaired and thereafter properly maintained it will be good for not less than 25 years additional service from that time. The Morgan's Louisiana & Texas Railroad & Steamship Company constructed and has since maintained at Patterson Street a viaduct across the same properties as the Newton Street viaduct crosses and subject to the same exposure, the structural part of said viaduct being constructed of steel of the same character as is used in the construction of the Newton Street viaduct. The Morgan's Louisiana & Texas Railroad & Steamship Company has properly maintained [fol. 72] the viaduct at Patterson Street and though the viaduct at Patterson Street was constructed in 1896 it now is, and, if properly maintained, will continue to be good for not less than 25 years additional service.

Since the Patterson Street viaduct was constructed it has not been necessary to renew any of the structural steel parts nor will it be

necessary if parts during tenance of has consist this is all th maintain sa

Had the N not e neces to the fact th and painted ture will no said viaduct essary to ren of the life of

On Febru ton Street vi visor of build Railroad & thereafter on who is Presi Light & Trac duct and call and requeste

Had the S time properly the repairs th time, due to forms a scale ments and ca first.

The presen Street extend yards and te & Steamship ton Street an Newton Street suitable and s properties at, eral hundred Company's p venting the u

The annex daries of the s ana & Texas affidavit, and erly, the locat daries of the by red lines.

Sworn 1923

y if the same is properly maintained, to renew any of said
 during the life of the viaduct as above set forth. The main-
 of the structural steel parts of the Patterson Street viaduct
 sisted solely of keeping the steel scaled and painted, and
 all that is necessary to be done hereafter in order to properly
 a same.

he Newton Street viaduct been properly maintained it would
 ecessary to renew any of the structural steel parts, but due
 et that said Newton Street viaduct has not been kept scaled
 uted, and solely to that fact, various parts of the steel struc-
 not have to be renewed. If and when same are renewed
 duct is thereafter kept scaled and painted it will not be nec-
 renew any of said structural steel parts during the balance
 e of said Newton Street Viaduct as above set forth.

bruary 22, 1922, I made a careful inspection of the New-
 et viaduct in conjunction with Mr. E. J. Legendre, Super-
 buildings and bridges for the Morgan's Louisiana & Texas
 & Steamship Company in the City of New Orleans and
 r on said date had a conference with Mr. E. W. Burgess,
 resident and General Manager of the South New Orleans
 Traction Company, with reference to the repair of said via-
 called his attention to the then condition of the said viaduct
 ested the said Traction Company to have same repaired.

he South New Orleans Light & Traction Company at that
 erly repaired the Newton Street Viaduct the cost of making
 s thereto would have been much less than at the present
 e to the fact that steel, after corrosion gets well started,
 scale which retain the moisture and other corrosive ele-
 d cause corrosion to progress much more rapidly than at

resent viaduct across the Company's property at Newton
 ends beyond each of the two sides of the present shopyards,
 d terminals of the Morgan's Louisiana & Texas Railroad
 hip Company a distance of several hundred feet on New-
 t and for such distance obstructs and prevents the use of
 street for any other purpose than the viaduct. No viaduct
 nd safe for traffic could be constructed across the company's
 at Newton Street without said viaduct extending sev-
 red feet on and over Newton Street on each side of the
 s properties and for such distance obstructing and pre-
 ne use of Newton Street for any and all other purposes.

nnexed blue print shows between red lines the present boun-
 the shopyards, shops and terminals of the Morgan's Louisi-
 as Railroad and Steamship Company referred to in this
 and also the location of the streets abutting on said prop-
 ocation of the present viaduct at Newton Street, the boun-
 the present shopyards and yard properties being shown
 es.

(Signed) H. H. Ueckert.

orn to and subscribed before me this 27 day of January,
 1923. (Signed) Henry H. Chaffee, Notary Public.

NOTE.—Blue-print referred to in the above affidavit was transmitted in the original to the Supreme Court of the United States.

[fol. 73] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF F. C. DUVIC—Filed January 27, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, F. C. Duvic, who being by me first duly sworn did depose and say, that he is a merchant and that he is engaged in business in Algiers as a merchant now and has been for thirty years and as such in the past has frequently made use of the present viaduct across the shop yards and yards of the Morgan's Louisiana & Texas Railroad & Steamship Company located in Algiers, which viaduct extends across said property and between the prolongation of the two sides of Newton Street. That he is familiar with the traffic moving over said viaduct and the extent and character thereof and that said viaduct when kept in repair is amply sufficient in size and design, and will be for many years to come, to take care of all kinds, characters and description of traffic desiring or intending to use same to cross said shop yards and yards at Newton Street.

(Signed) F. C. Duvic.

Sworn to and Subscribed to before me this 24th day of January 1923. (Signed) Edward L. Gladney, Jr., Notary Public. (Seal.)

[fol. 74] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. CASTROGIOVANNI—Filed January 27, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before, the undersigned authority, A. Castrogiovanni, who being by me first duly sworn deposed and says: That he is grocer and conducts a large business in the City of Algiers, where he has resided for many years; that he has had occasion to pass over the viaduct, at Newton Street in the City of Algiers; that he is thoroughly acquainted with the nature and extent of traffic conditions thereon; that the design, size and extent of said viaduct is ample and sufficient to accommodate all kinds, descriptions, and natures of traffic over said viaduct for many years to come, when kept in repair.

(Signed) A Castrogiovanni.

Sworn to and subscribed before me this 24th day of January, 1923. (Signed) Edward L. Gladney, Jr., Notary Public. (Seal.)

[fol. 75] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. J. MOTHE—Filed January 27, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, E. J. Mothe, who being by me first duly sworn deposed and says, that he is engaged in the undertaking business in the City of Algiers where he has resided for the past twenty years; that he uses in his business four cars; that he has frequently had occasion to use the viaduct which crosses the tracks of the Morgan's Louisiana and Texas Railroad Company in prolongation of Newton Street in the City of Algiers, and is thoroughly familiar with the nature, character and extent of the traffic which crosses said viaduct, that said viaduct is sufficient in size and design to take care of all kinds of traffic that will use said viaduct for many years to come, when said viaduct is kept in proper repair.

(Signed) E. J. Mothe.

Sworn to and subscribed to before me this 24th day of January, 1923. (Signed) Edward L. Gladney, Jr., Notary Public. (Seal.)

[fol. 76] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FELIX BORNE, JR.—Filed January 27th, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, Felix Borne, Jr. who being by me first duly sworn deposes and says; that he has been a resident of Algiers all of his life; that he has been engaged in the hardware business in Algiers for seventeen years; that in his business he has often in the past had occasion to use the Newton Street Viaduct and he is thoroughly familiar with the nature and extent of the traffic over said viaduct; that said viaduct when kept in repairs is amply sufficient in extent, size and design to take care of traffic of all descriptions that have or may have occasion to use, said viaduct and would meet the requirements of all kinds of traffic for years to come.

(Signed) Felix Borne, Jr.

Sworn to and subscribed to before me this 24th day of January, 1923. (Signed) Edward L. Gladney, Jr., Notary Public. (Seal.)

[fol. 77] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN MCGUIRE—Filed January 27th, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, John McGuire, who upon being by me first duly sworn did depose and say:

That during the year 1914 he retired from the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company on a pension which he is now receiving from said Company. That he was in the continuous employ of the Morgan's Louisiana & Texas Railroad & Steamship Company in the City of New Orleans from the date of its incorporation in 1877 up to 1914 when he retired on a pension.

During said period he was employed in various capacities, first in the round-house on the property now known as the Algiers shops, shop yards, yards and terminals of the Company in Algiers, which property was at that time bounded on the upper side by Verret Avenue and on the lower side by a street then and now known as Thayer Avenue. That thereafter he was employed as a switchman working in said yards. That thereafter he was employed as yard master in the City of New Orleans, thereafter as agent of the said Company in the City of New Orleans, thereafter as superintendent of terminals and thereafter as assistant superintendent of terminals and *and* superintendent of terminals up to the time he retired on pension in 1914.

During all the periods just mentioned he was familiar and is now familiar with the property of the Morgan's Louisiana & Texas Railroad & Steamship Company known as its shops, shop yards and terminals in that portion of New Orleans known as Algiers. That during all of said periods up to and including the present, no street or road or road-way or crossing was ever laid out or opened by anyone or ever existed across said property at or in the vicinity of the prolongation of the two sides of Newton Street except the viaduct which now exists and which was completed about the year 1907 across the said property between the prolongation of the two sides of Newton Street on which viaduct the South New Orleans Light & Traction Company which company operates the street railroad in Algiers ran its cars on tracks constructed on said viaduct.

There also exists across said property at Patterson Street a traffic viaduct and at Eliza Street there exists a foot viaduct both of which were constructed several years ago.

To my knowledge, the property above referred to in this affidavit has been under fence and in the sole and exclusive possession of the Morgan's Louisiana & Texas Railroad & Steamship Company for more than forty years.

(Signed) John McGuire.

Sworn to and subscribed before me at New Orleans, Louisiana,
on this the 24th day of January, 1923. (Signed) Henry
H. Chaffe, Notary Public. (Seal.)

[fol. 78] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOSEPH W. LENNOX—Filed January 27, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, Joseph W. Lennox, who being by me first duly sworn deposes and says: that he is a resident of Algiers, Louisiana where he has resided some sixty odd years; that he is engaged in the banking business in said city, as supervisor of the Algiers Branch of the Interstate Bank; that he is familiar with the Newton Street Viaduct crossing the tracks of the Morgan's Louisiana and Texas Railroad tracks in the city of Algiers; that he knows the nature of traffic that has used said viaduct in the past; that the size, extent, width and design of said viaduct has been sufficient to accommodate all traffic that would have crossed said tracks at that point; that when kept in proper repair said viaduct would be ample and sufficient to meet the needs of all kinds and descriptions of traffic that might use said viaduct for many years to come.

(Signed) Jos. W. Lennox.

Sworn to and subscribed before me this 26th day of January
1923. (Signed) Edward L. Gladney, Jr., Notary Public.
(Seal.)

[fol. 79] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF P. B. TORIAN—Filed January 27th, 1923

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned authority, P. B. Torian, who upon being by me first duly sworn did depose and say:

I am now in the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company as Superintendent of Terminals in New Orleans which includes Algiers.

I have held this position for the past six years. I have been in the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company for more than 35 years, during all of which time my duties required me at frequent intervals to visit the shops, shop yards, yards and terminals in Algiers.

When I first entered the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company the shops, shop yards, yards and terminals were located in Algiers on a strip of land about three hundred and seventy five feet front on the Mississippi River by over a mile and a half in depth, bounded on the lower side by what is known as Thayer Avenue; during all of which period the said shops, shop yards and yards were under fence on both sides, the fences running continuously along the strip of land above mentioned from Patterson Street for a distance of about a mile and a half back from the River, and said property was in the sole and exclusive possession and control of the Morgan's Louisiana & Texas Railroad & Steamship Company, the public being excluded therefrom and being prohibited and prevented from using same as a thoroughfare, and from crossing over same. The fence to which I have just referred extended beyond Newton Street for a distance of over half a mile.

About eight years ago, the Morgan's Louisiana & Texas Railroad & Steamship Company acquired a strip of land about three hundred feet wide running from the river about seven hundred feet beyond Newton Street, which strip of land was incorporated in the shops, shop yards and yard property, and the fence on the upper side of the then shop property was moved to the upper boundary line of the strip then acquired, and said property as thus enlarged has continuously from that time been, and now is, fenced on each side with a continuous fence and said property as thus enlarged has been in the sole and exclusive control of the Morgan's Louisiana & Texas Railroad & Steamship Company, and the public has been excluded therefrom and prevented from crossing thereover except on the viaduct which was constructed about 1907 at Newton Street, and except on a foot viaduct at Eliza Street and except on a viaduct at Patterson Street, all of which viaducts are now in existence and are being used by the public.

I have on numerous occasions called the attention of the authorities of the City of New Orleans and also the officials of the South New Orleans Light & Traction Company to the fact that the viaduct at Newton Street was in need of repairs. The President of the South New Orleans Light & Traction Company has on several occasions admitted to me that that Company had made repairs to said viaduct during the course of the last five years.

My duties require me to be at the shop yards above mentioned practically daily, sometimes several times a day, and I have had occasions to, and have noted the traffic using the Newton Street Viaduct. Said viaduct is of ample size and design to accommodate all traffic of all kinds, characters and description. There at no time in so far as I have ever seen been any congestion whatever on said viaduct and in my opinion said viaduct if put and kept in repair will be amply sufficient for all traffic for many years to come.

The South New Orleans Light & Traction Company is now operating its street cars on and over a large part of the present Newton Street viaduct and are transferring its passengers on and over the [fol. 80] balance of said viaduct from car to car. Said viaduct is also being used by pedestrians generally.

The South New Orleans Light & Traction Company operated its street railroad cars across all of said viaduct up to a few months ago, and said viaduct was used for all other classes of traffic up to the Fall of 1922.

(Signed) P. B. Torian.

Sworn to and subscribed before me at New Orleans, Louisiana, on this the 26 day of January 1923. (Signed) Henry H. Chaffe, Notary Public.

[fol. 81] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. J. LEGENDRE—Filed January 27th, 1923

STATE OF LOUISIANA,
Parish of Orleans;

Personally came and appeared before me, the undersigned authority, E. J. Legendre, who upon being by me first duly sworn did depose and say that he is in the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company and has been for the past thirteen years, with his headquarters in the shops of said Company in Algiers. That he is familiar with said property and that during all of said time both sides of said property from Patterson Street on the Mississippi River back about a mile and a half has been fenced with a continuous fence. That on the lower side of said shop yard property is a street known as Thayer Avenue. That during all of said period the public have been excluded from said property and have not been permitted to use same as a thoroughfare or to cross same except on the viaduct at Patterson Street, the viaduct at Eliza Street and the viaduct at Newton Street.

That up to the Summer of 1922, the Street railroad operated its street railroad cars across the Newton Street Viaduct, and the Newton Street viaduct was used also for all other kinds and classes of traffic, and that up to the Fall of 1922, said viaduct was used for vehicular traffic, and that at the present time said viaduct is used for pedestrian traffic, and also by the South New Orleans Light & Traction Company, which company operates at the present time its street railroad cars over all of said viaduct except 435 feet, for which distance its passengers walk from car to car, the cars going down stopping on said viaduct and the cars going up stopping on said viaduct 435 feet apart.

That during the past five years affiant has repeatedly called the attention of the officials of the South New Orleans Light & Traction Company to the fact that said viaduct was in need of repair and said South New Orleans Light & Traction Company has actually made during said period repairs to said viaduct.

That affiant's employment by the Morgan's Louisiana & Texas Railroad & Steamship Company is now and has been for eight or nine years, Supervisor of Bridges and Buildings, and in such capac-

ity affiant is required to inspect all the structures on the property of said Company whether owned by it or by others, and in so far as the structures belonging to the Company are concerned, see that same are kept in proper repair.

That in his said capacity he has kept the viaduct across the Company's property at Patterson Street in good condition, the only repair to the steel portions of the structure being the sealing and painting thereof periodically. That he informed the South New Orleans Light & Traction Company that such work was necessary on the Newton Street Viaduct and has said work been performed on said viaduct same would now have been in good condition and would have been good for twenty-five years of service had it been kept sealed and painted thereafter.

(Signed) E. J. Legendre.

Sworn to and subscribed before me at New Orleans, Louisiana, on this the 26 day of January 1923. (Signed) Henry H. Chaffe, Notary Public.

[fol. 82]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF GUY HOPKINS—Filed January 27th, 1923

STATE OF LOUISIANA,

Parish of Orleans:

Personally came and appeared before me, the undersigned authority, Guy Hopkins who upon being by me first duly sworn did depose and say:

In the year 1895 I graduated from Stevens Institute of Technology in the State of New Jersey receiving the Degree of Mechanical Engineer. After my graduation and during the year 1895, I entered the employ of Morgan's Louisiana & Texas Railroad & Steamship Company in its shops at Algiers. I continued in the employ of that Company uninterruptedly up to September 1916, during which period I held the following positions: draftsman, Assistant Master Mechanic, Operating Engineer, President's representative in New Orleans, Acting General Superintendent and Vice President.

At the time I entered the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company its shops, shop yards and yards were located on a strip of land measuring about three hundred and seventy feet front on the Mississippi River by over one mile in depth between parallel lines being bounded on the lower side by Thayer Avenue. Subsequently the site of the shops, shop yards and yards was widened by including therein a strip of land running along the upper boundary which strip was about three hundred feet wide.

At the time I entered the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company the strip of land above de-

scribed on which its shops, shop yards and yards were located was under fence on both sides, the fences extending back continuously from Patterson Street a distance of approximately a mile and a half; that is, for over a half a mile beyond Newton Street. The property was continuously so fenced up to the time that the yards were enlarged as above, and on the yards being enlarged as above the fence was immediately moved to the upper side of the newly acquired strip, and since that time said yards as enlarged have been fenced on each side beginning at Patterson Street and running towards the rear for a distance of about a mile and a half.

From the time I entered the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company up to the time I severed my connections with the Company in 1916, the shops, shop yards and yards above described were in the sole and exclusive possession of the Morgan's Louisiana & Texas Railroad & Steamship Company and the public was not permitted to use same as a thoroughfare or to cross thereover, and I am informed that for more than twenty years prior to my being employed by the Morgan's Louisiana & Texas Railroad & Steamship Company and since I have severed my connections with said Company said property had been and is in the sole and exclusive possession and control of the Morgan's Louisiana & Texas Railroad & Steamship Company. That said property had been and is now under fence and that the public was not permitted to use same as a thoroughfare or to cross thereover.

During the first ten or twelve years of my employment by the Morgan's Louisiana & Texas Railroad & Steamship Company I worked at the shops at Algiers above mentioned and from that time until I severed my connections with the Company my duties required me to visit said shops and yards on frequent occasions.

(Signed) Guy Hopkins

Sworn to and subscribed before me this 27th day of January 1923. (Signed) Henry H. Chaffe, Notary Public. (Seal.)

[fol. 83] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF M. A. WESTCOTT—Filed January 27th, 1923

STATE OF TEXAS,

County of Harris,

City of Houston:

Personally came and appeared before me, the undersigned authority duly commissioned and qualified, M. A. Westcott, who upon being by me first duly sworn did depose and say:

I am now and have been since 1913 the right of way agent of the Morgan's Louisiana & Texas Railroad & Steamship Company, and as such in charge of the titles and records pertaining to the titles to the right of way and all real estate owned, occupied or used by

the Morgan's Louisiana & Texas Railroad & Steamship Company, and am familiar with all of the property owned by said Company.

Since 1913 no street, road or road-way has been laid out, opened, dedicated, granted to or in any other manner acquired across the property of the Morgan's Louisiana & Texas Railroad & Steamship Company in the City of New Orleans which it acquired from Charles Morgan by act before Andrew Here, Jr., dated April 9, 1878, and known as the shons, shopyards, yards and terminals in that portion of New Orleans known as Algiers by either the United States of America, State of Louisiana, City of New Orleans or any other political sub-division of said State, or by the public or by any person, firm or corporation, at or in the vicinity of the prolongation of the two sides of what is known as Newton Street, and no right to cross said tract of land has, during said period, at or in the vicinity of said point, been granted to or in any other manner acquired by the United States of America, State of Louisiana, City of New Orleans, or any other political sub-division of said State or by the public, or by any person, firm or corporation, and no street, road or roadway or passage way except the Newton St. Viaduct exists across said property at Newton St. I have examined the records of my office which contain all data with reference to the titles of real estate owned by said Morgan's Louisiana & Texas Railroad & Steamship Company, and I do not find that said Company ever granted to the United States of America, State of Louisiana, City of New Orleans or any other political sub-division of the State or to the public, or to any person, firm or corporation the right to cross said above mentioned property at or in the vicinity of Newton Street with a road, road-way, passage way or with any structure of any kind, character or description, or that any such right was ever acquired by the United States of America, State of Louisiana, City of New Orleans, or any other political sub-division of the State, or by the public, or by any person, firm or corporation except the right acquired by the City of New Orleans under and in accordance with the agreement set forth in Ordinance No. 2906 New Council Series adopted by the City of New Orleans on February 28, 1905 and approved by the Mayor of the City of New Orleans on March 1, 1905.

(Signed) M. A. Westcott

Sworn to and subscribed before me on this 25 day of January 1923. (Signed) Raymond Neilson, Notary Public, Harris County, Texas. (Seal.)

[fol. 84 & 85]

Appearances:

Edwin C. Kohn (New Orleans, Louisiana), for residents of the Fifth District of New Orleans, Complainants.

Henry H. Chaffe (New Orleans, Louisiana), for the Morgan's Louisiana and Texas Railroad and Steamship Company

E. Howard McCaleb (New Orleans, Louisiana), for South New Orleans Light and Traction Company.

[fol. 86]

New Orleans, Louisiana, October 4, 1922.

Proceedings

Commissioner Williams: This is a petition filed with the Commission by residents of the Fifth District of the City of New Orleans the purpose of which is to require the Southern Pacific Railroad, —the Morgan's Louisiana and Texas Railroad and Steamship Company, to give the full name of the company,—to immediately proceed to reconstruct and repair and to maintain the Newton Street Viaduct over its tracks in Algiers. Are you gentlemen ready to proceed with the hearing?

Mr. Chaffe: I have filed an exception, Mr. Commissioner, and to make up the record I will offer in evidence the title of the Morgan's Louisiana and Texas Railroad and Steamship Company to the property across which the Newton street viaduct runs. I also offer in evidence a map of the city of New Orleans. I offer in evidence the ordinance and contract under which the Newton street viaduct was constructed; and I offer the ordinance and contract under which the South New Orleans Railway and Light Company with its street railroad makes use of this viaduct.

Commissioner Williams: They can be filed later.

Mr. Chaffe: Yes.

Commissioner Williams: All right. I suppose you want to take up the exception first?

[fol. 87] Mr. Chaffe: Yes, I will simply read it.

(The Exception to the jurisdiction of the Commission is here read and submitted).

Commissioner Williams: The exception is overruled. We will now proceed to hear the testimony.

Mr. Chaffe: I would like to add this: in view of the fact that the exception is overruled, with argument, and without separate hearing,—I would like to ask, first, for a continuance of this case because of the illness of Mr. Torrior, the official of the Southern Pacific Lines in charge of such matters. He is now ill in bed and cannot attend.

Commissioner Williams: When will he be able to be out?

Mr. Chaffe: I don't know; he was taken sick a couple of days ago and is now in bed. He has Dangué fever.

Commissioner Williams: Well, in view of the number of people who are present I think we had better go ahead and take such testimony as these people present are ready to present and we can then continue the case a reasonable length of time to hear Mr. Torrior. We can't extend it too long, of course, because these people are in bad shape over there and we have got to get action. We will go as far as we can and then fix a date on which we will hear Mr. Torrior's testimony.

Mr. Chaffe: I have not filed a written answer and I would like to dictate into the record the answer of the Morgan Company.

Commissioner: Go ahead.

[fol. 88] Mr. Chaffie: With full reservation of all rights under the exception heretofore filed and overruled, the answer of the Morgan's Louisiana and Texas Railroad and Steamship Company in this proceeding is that it owns in fees simply the land on which, or over part of which, the Newton street viaduct extends; that the viaduct in question was constructed by the city of New Orleans, and under an obligation by the city of New Orleans to maintain the viaduct, that being a part of the consideration for the permission given to cross the property and which permission the city could not and would not have otherwise obtained without expropriation at that time; that thereafter the city of New Orleans granted a franchise to the street railway company to lay its tracks and operate its cars over the Newton street viaduct, the consideration, or one of the considerations of the grant being that the street railway company should maintain the viaduct; and that under these circumstances, the viaduct in question being in effect a public street in the city of New Orleans the obligation is, first, on the city, in so far as the public is concerned, to maintain the viaduct; and, second, for the city to see that the street railway, to whom it granted this franchise to use the viaduct, should maintain it under the terms of that grant and franchise; further than that, that the viaduct has gotten into the condition in which it now is solely through neglect and failure to maintain, and that the burden imposed on the city primarily, and under its contract with the traction company, on the traction company, cannot, through neglect of the city or of the traction company, [fol. 89] either or both, to maintain this viaduct be shifted, either in law or good morals, to the Morgan Railroad; and therefore we ask that the complaint be dismissed. Is that statement or will that statement be considered as a satisfactory answer, Mr. Commissioner? As I said, I have not prepared a written answer.

Commissioner Williams: That is satisfactory, yes, sir. Now, gentlemen, the Commission is of this opinion: the only point involved in this case is whether or not this Commission, first of all, whether or not the Southern Pacific shall be required to build a viaduct over its yards and tracks in Algiers for the purpose of permitting automobiles and pedestrians and other traffic to go from the upper end of Algiers to the lower end, and vice versa without under inconvenience; and, second, whether the Commission has the right to require the Southern Pacific to do so. The second point is whether the circumstances are such as to permit us to give this Commission the right to enforce the construction or repair or maintenance of the present viaduct or to build another one. Now, the matter of the obligations, if any, of this street railway company over there does not come within our jurisdiction at all and we gave no right to consider that feature of it at all. That is a different matter entirely. We are considering this viaduct proposition first from the standpoint of public necessity for a viaduct across the Southern Pacific yards in Algiers, just as if there had never been and was not now a viaduct [fol. 90] there, and as if this was entirely a new proposition, separate and distinct from any franchise obligation of the Algiers street railway to the city of New Orleans or of any obligation resting on

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city of New Orleans. Therefore, all testimony with regard to contractual obligation of the street railway, because the street way company is not within our jurisdiction, would be irrelevant to this proceeding; and the testimony will be confined to the question of whether or not there should be a viaduct at Newton street and the tracks of the Southern Pacific Company, and if there is necessity for such a viaduct, whether the Southern Pacific Company should be required to supply it. That is the sole question which presents itself to the Commission and the testimony will be confined to that feature.

Mr. Chaffie: In view of the statement just made by the Commissioner I should like to supplement my answer as dictated into the record. I would like to urge that the city of New Orleans has sole control over its streets under the law; that no action by this Commission can control the opening or closing of streets or any substitutions therefor in the city of New Orleans, this Commission being without power to do so; that under the law the city of New Orleans cannot take private property for street purposes or any other public purpose, either in whole or in part, without making just compensation therefor; and that no action of this Commission can be taken as a substitute for such action, and that to do so would be to deprive the defendant of its property without due process of law and without just compensation.

[91] Commissioner Williams: Well, that is practically what I set up in your exception.

Mr. Chaffie: It is agreeable to the Commission to add it to the record.

Commissioner Williams: Yes, but as I said before, we are not interested in the obligations of the city of New Orleans nor of the street railway over there. Neither of those propositions are involved in this proceeding, and they could not be involved. There are only two points on which we are going to take evidence: the necessity for a viaduct, whether it be the present structure or some other structure, and the tracks of the Southern Pacific Company at Newton street, and the right of this Commission to require the Southern Pacific to furnish such a viaduct.—now, whether it be the existing viaduct or whether one we have nothing to do with, or have we anything to do with the relations between the city of New Orleans and the street railway company over there. I want that to be plainly understood at the very beginning.

Mr. Chaffie: We object to any testimony being taken in this case on the ground that the Commission has no jurisdiction to hear and determine same.

Commissioner Williams: The objection is overruled.

Mr. Chaffie: The same objection is made to all testimony taken in this case, without any waiver of same, and likewise all witnesses will be cross examined without waiver of said objection, but without necessity of repeating it each time.

Commissioner Williams: That is all right. Now, Mr. Fitzpatrick [92] is here and it is important for him to get away and we will hear his testimony first.

Mr. HARRY FITZPATRICK was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Mr. Fitzpatrick, are you familiar with the viaduct across the tracks of the Southern Pacific Railroad at Newton street in Algiers?

Mr. Fitzpatrick: Not from personal inspection, but I am familiar with it from the report that has been handed in by Fire Hazard Inspector Hayden Wren, who was sent to inspect it at my instance.

Mr. Chaffer: I object to the witness testifying about the Newton street viaduct or the necessity of a viaduct there unless he has made a personal inspection. He says that he has made none and I submit that his testimony would be merely hear-say.

Commissioner Williams: Have you the report, Mr. Fitzpatrick?

Mr. Fitzpatrick: It is in writing, from Mr. Wren. It is not an official report because he was sent only this morning. However, I can go over and inspect it personally if you wish. My position in this matter is merely that of Fire Commissioner. The Fire Board doesn't know anything about the merits or demerits of this controversy; but with us it is merely a question of an emergency existing over there which has been directed to our attention and a situation which interferes with the duty of the department in protecting the lives and property of the people of Algiers.

Commissioner Williams: We want to get this over with and if you say you will offer in evidence the report of the Fire Hazard Inspector [fol. 93] you can do that, or you can swear him later.

Mr. Fitzpatrick: He is right there and you can swear him if you want to.

Commissioner Williams: We will do it that way.

Mr. HAYDEN WREN was called as a witness and, having been duly sworn, testified as follows:

Mr. Kohn: Mr. Wren, have you had occasion in your official capacity to inspect the Newton street viaduct in Algiers?

Mr. Wren: I have been over it twice.

Mr. Kohn: Have you seen it since the break in it?

Mr. Wren: Yes, sir.

Mr. Kohn: Now, in case of a fire in the lower district down below the Southern Pacific tracks, without the viaduct in operation or in good repair, is it a matter of *ease* convenience to get to a fire down there, without having that viaduct there or some method of crossing those tracks?

Mr. Wren: Well, I would imagine that the fire department,—I would say that these engines would have to go a great many blocks out of the way to get to a fire down there on account of the viaduct being out of commission.

Mr. Kohn: Are there a great many people that live down there, to your knowledge?

Mr. Wren: Why, I didn't canvass the territory, but I imagine there are enough down there to give fire protection to all right.

Mr. Kohn: Then you consider that a viaduct at that point is an absolute necessity from the standpoint of fire protection alone?

[fol. 94] Mr. Wren: Well, either that or open up the street through there.

Mr. Chaffe: If the present Newton street viaduct had been kept in repair and was in repair now, there would not be any necessity for anything further there from the point of view of fire protection, would there?

Mr. Wren: Well, that is the trouble today.

Mr. Chaffe: I know it is, but that isn't what I asked you. If the present Newton street viaduct had been kept in repair and were in repair today there would not be any necessity for any street or additional viaduct there from the point of view of fire protection, would there?

Mr. Wren: None at all. I imagine not.

Commissioner Williams: You say you imagine. Is it a fact or not? You are not just guessing, are you?

Mr. Wren: No, he asked me about the property down there and I said I would surmise that there is enough people on the other side of the viaduct to be entitled to fire protection.

Commissioner Williams: Have you ever been on the other side of the viaduct?

Mr. Wren: Yes, sir.

Commissioner Williams: Have you seen the homes and residences and business properties below the viaduct?

Mr. Wren: Yes, sir. I would imagine that there are homes over there worth \$5,000 or \$6,000 or \$7,000, easily enough.

Commissioner Williams: A great many people live below the viaduct, don't they?

[fol. 95] Mr. Wren: Yes, sir.

Commissioner Williams: How many people would you say were down there in that district?

Mr. Wren: Well, my conclusion is——

Mr. Chaffe: I object to the witness giving his conclusions. He has clearly indicated that he has made no inspection for the purpose of qualifying himself to testify on that point and we object to his testimony.

Mr. Wren: I could check it up.

Mr. Chaffe: But you haven't done it.

Commissioner Williams: You are not able to say anything about the number of homes or houses down there or the number of people living down there?

Mr. Wren: No, but I could go check it up. I do know, though, that there are enough people down there that I surmise are tax payers to be entitled to protection. I couldn't say as to the number of them but I could check it up readily and submit it.

Mr. Kohn: That is all, Mr. Wren: Commissioner, we have a number of witnesses here to testify to the necessity for this viaduct and if Mr. Chaffe will admit——

Mr. Chaffe: I am sorry, but I cannot admit anything.

Witness excused.

[fol. 96] Mr. J. H. LEWIS was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Where do you live, sir?

Mr. Lewis: I live down at McClelandville, the terminal of the South New Orleans Railway and Light Company's car line.

Mr. Kohn: How far from the Newton street viaduct do you live?

Mr. Lewis: About two miles and a half.

Mr. Kohn: Is that vicinity built up or is it just separately settled?

Mr. Lewis: Well, it is pretty well filled up there. We have the Immigration Station right there and a good many people live down in that section.

Mr. Kohn: You frequently travel up and down that road between McClelandville and Algiers?

Mr. Lewis: Yes, sir.

Mr. Kohn: How have you been getting from the other side of the Southern Pacific tracks to Algiers?

Mr. Lewis: Over the Newton street viaduct.

Mr. Kohn: Can you go over that viaduct now?

Mr. Lewis: No, sir, you have to take a car and go as far as the viaduct and then get off and walk across the viaduct and take the car on this side.

Mr. Kohn: Is a viaduct or a surface crossing at that point or some other central point necessary, as to point of distance, to enable you to get easily and conveniently to Algiers?

Mr. Lewis: Well, like it is now you would have to go up Newton [fol. 97] street to Behrman street and then from Behrman into Patterson street and then cross over on the Southern Pacific viaduct over Patterson street,—that is the old viaduct originally built by the Southern Pacific,—built to take the place of the surface street. The surface street was very dangerous in the old times and so the Southern Pacific constructed the present viaduct on Patterson street.

Mr. Chaffe: I suppose it is understood that when this witness or any of the other witnesses refer to the Southern Pacific or the S. P. that they have reference to the Morgan's Louisiana and Texas Railroad and Steamship Company.

Mr. Kohn: Oh, yes.

Commissioner Williams: That is understood.

Mr. Kohn: Mr. Chaffe: before I go on with these other witnesses here is what I wanted you to admit, if you would—only the necessity for a viaduct there, without admitting any liability at all. I do not ask you to admit liability, of course,—merely that the necessity exists for a viaduct there.

Mr. Chaffe: I cannot make any admissions of any character. When somebody is stabbing me in the back and asks me not to look around I might like to favor him but my own protection requires that I do look around. I can't admit anything.

Mr. Kohn: All right. You can have the witness.

Mr. Chaffe: Mr. Lewis, the Newton street viaduct is in existence there today, is it not? It is physically there, whether in a usable condition or not?

[fol. 98] Mr. Lewis: Oh, yes, it is there all right.

Mr. Chaffe: And if the present Newton street viaduct were in repair today and had been kept in repair there would be no necessity for any other viaduct or any other method of crossing there, would there?

Mr. Lewis: No, sir, because you would have a means of crossing then.

Commissioner Williams: How many blocks is it necessary for people living down where you live to detour in order to get to the upper side of Algiers the way you have to go now?

Mr. Lewis: I suppose it is about twentyfive blocks or in that neighborhood.

Commissioner Williams: You mean to say that the upper part of Algiers is twenty five blocks from where you live?

Mr. Lewis: No, sir, but we go up General Meyer Avenue, which we have to go up anyway to cross the Newton street viaduct; but then when we get to Berhman street we have to turn and go to the old viaduct at Patterson street and cross there; and it is just a dirt street and very bad in wet weather. You can't hardly get through it.

Commissioner Williams: What is the condition of the Newton Street viaduct?

Mr. Lewis: It is in pretty bad shrape.

Mr. Chaffe: We object to that; this witness is not an expert.

Commissioner Williams: He can tell what he saw.

Mr. Lewis: Well, the condition exists right over the main traffic [fol. 99] tracks of the M. L. & T. Railroad,—that is where the conditions are bad.

Commissioner Williams: Did you see anything wrong with the viaduct?

Mr. Lewis: Yes, sir, I saw that the iron was all eaten through which I attribute to the acid and the smoke.

Mr. Chaffe: I object to his testifying as to what he attributes the condition to.

Commissioner Williams: Just testify to what you saw.

Mr. Lewis: Well, that is what I saw.

Mr. Chaffe: Mr. Lewis, how far is McClenlandville below the Immigration station?

Mr. Lewis: Well, that is where the station is.

Mr. Chaffe: Is that within the city limits?

Mr. Lewis: Yes, sir, the city limits extend down to Pointe Viga plantation, about nine miles below.

Witness excused.

[fol. 100] Mr. WILLIAM M. HOFSTETTER was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Where do you live, sir?

Mr. Hofstetter: 2201 Newton street.

Mr. Kohn: Is that above or below the viaduct in Algiers?

Mr. Hofstetter: It is six squares below the viaduct.

Mr. Kohn: What business are you engaged in?

Mr. Hofstetter: In the retail grocery business.

Mr. Kohn: In connection with your business do you have occasion to use vehicles of any kind—motor trucks or delivery wagons, or anything of that kind?

Mr. Hofstetter: I have a half ton Ford truck and I have to make four or five trips to Algiers on the other side of the railway shops daily.

Mr. Kohn: Do you find that since the viaduct has been in the condition which it now is that it makes it more burdensome to you to get to your customers in Algiers on the other side of the track by truck?

Mr. Hofstetter: Yes, sir, it puts me to the inconvenience of going out of the way at least twenty five or thirty squares each trip, which I didn't have to do before the Newton street viaduct went out of repair.

Mr. Kohn: Are there any schools near your place?

Mr. Hofstetter: Yes, sir.

Mr. Kohn: What schools are near there?

Mr. Hofstetter: The Adolph Meyer school.

Mr. Kohn: Are there any government guildings there that house men?

[fol. 101] Mr. Hofstetter: Yes, sir, the Marine Barracks.

Mr. Kohn: Do you know how many men there are there?

Mr. Hofstetter: Well, at present there are between fifty and seventy five Marines there.

Mr. Kohn: Below the Marine Barracks are there any other government agencies that take care of men and house men?

Mr. Hofstetter: Yes, sir, the Military Hospital.

Mr. Kohn: Are there many disabled men kept there under the care of the government?

Mr. Hofstetter: Yes, sir, quite a number of them, but I don't know just how many.

Mr. Kohn: Do you know how the government transports these men to and from the Military Hospital when the necessity arises?

Mr. Hofstetter: Yes, by truck.

Mr. Kohn: Do they use the viaduct also?

Mr. Hofstetter: They did use the Newton street viaduct, but now they have to go around by way of Patterson street, like every body else.

Mr. Kohn: Are there very many people down in that section back of the Naval Reservation?

Mr. Hofstetter: Yes, sir.

Mr. Kohn: Is it thinly or thickly populated through there?

Mr. Hofstetter: Yes, sir, it is thickly populated.

Mr. Kohn: They the Newton street viaduct appears to be necessary to your convenience and the convenience of other people who reside in that neighborhood?

[fol. 102] Mr. Hofstetter: Yes, sir, it is positively necessary to have that viaduct at Newton street opened up and put in repair.

Mr. Chaffe: If the Newton street viaduct were in repair and had been kept in repair there would be no necessity for any other viaduct there, would there?

Mr. Hofstetter: No, sir.

Mr. Chaffe: Where is your place of business?

Mr. Hofstetter: 2201 Newton street.

Mr. Chaffe: How far below the Southern Pacific properties is that?

Mr. Hofstetter: About six blocks.

Mr. Chaffe: Are you between the Naval Station and the Southern Pacific properties?

Mr. Hofstetter: Right opposite the Marine Barracks, yes, sir.

Mr. Chaffe: Right opposite the Marine Barracks?

Mr. Hofstetter: Yes, sir.

Mr. Chaffe: They you are on the west side of the road, or of Newton street?

Mr. Hofstetter: No, sir, on the south side of Newton street.

Mr. Chaffe: But considering the river as the east side——

Mr. Hofstetter: Well, yes, that would be the west side then.

Mr. Chaffe: That would be the west side?

Mr. Hofstetter: Yes, sir.

Mr. Chaffe: I will put it another way; are you on the river side of Newton street or on the woods side?

Mr. Hofstetter: On the woods side.

Mr. Chaffe: Now, you said something about getting back of Algiers?

[fol. 103] Mr. Hofstetter: Yes, sir.

Mr. Chaffe: How do you get in now?

Mr. Hofstetter: All the way around the Patterson street viaduct and then over on the Algiers side of the shops.

Mr. Chaffe: You go around by way of Patterson street?

Mr. Hofstetter: Yes, sir, Patterson street.

Commissioner Williams: Mr. Hofstetter, you live below the viaduct,—on the lower side?

Mr. Hofstetter: Yes, sir, below the viaduct.

Commissioner Williams: And you require the viaduct to get to the upper part of Algiers?

Mr. Hofstetter: Yes, sir, to get to my trade.

Mr. Chaffe: You have never counted the houses below,—say below the lower end of the Naval Station and the Southern Pacific tracks, have you?

Mr. Hofstetter: No, sir, I never counted them.

Mr. Kohn: In connection with the testimony of this witness we will ask permission to file excerpts from the tax rolls showing the number of houses down there, the improvements and the assessed valuation.

Mr. Chaffe: I object to that on the ground that the assessment roll does not show whether a piece of ground has a house on it or not. It simply shows that there is a piece of ground there.

Mr. Kohn: It would tend to show the number of people.

Mr. Chaffe: No, it would not, and I object because it could show only the ground. I will make this admission, however, that there [fol. 104] is ground from the lower side of the Southern Pacific shops down to the mouth of the river; and that is about all the assessment roll will show.

Commissioner Williams: Well, the objection is overruled, but I

will say this that when the exhibits are filed they will only tell the story they are capable of telling and will only be considered for what they are worth.

Mr. Kohn: Mr. Commissioner, we have a couple officers here from the United States Public Health Service; they are very anxious to get back to their duties and I would like to use them next.

Commissioner Williams: That is all right.

Witness excused.

[off. 105] Dr. E. P. O'DON'DALL was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Major, you are connected with the Public Health Service of the United States?

Dr. Odon'dall: I am a doctor, yes, sir, in charge of Veterans' Hospital No. 84, at Algiers.

Mr. Kohn: Where is the hospital situated in Algiers?

Dr. Odon'dall: On the naval reservation.

Mr. Kohn: About how far below the Newton street viaduct of the of the Southern Pacific is the Naval Reservation?

Dr. Odon'dall: Approximately half a mile.

Mr. Kohn: Have you at all times a number of men down there being treated?

Dr. Odon'dall: We have an average patient population of 200. That fluctuates somewhat occasionally, of course, running 198 or 199, but we have a bed capacity of 101 and as a rule we are operating at capacity.

Mr. Kohn: Is anything contemplated whereby the Government expects to build extensions there to take care of more patients?

Dr. Odon'dall: Yes, sir, we have recently purchased buildings and contemplate enlarging the hospital, making an addition of 150 beds more.

Mr. Kohn: How do you transport your patients to and from the Naval station, Doctor?

Dr. Odon'dall: Why, by automobile and ambulance,—that is, those who are unable to come on the street cars.

[fol. 106] Mr. Kohn: Now, in using ambulances and automobiles to get to the city what route or routes have you been using?

Dr. Odon'dall: Both the Newton street viaduct and the other viaduct,—I forget the name,—I think it is Patterson street.

Mr. Kohn: Have you had occasion to use the Patterson street viaduct and go up Behrman Avenue before the Newton street viaduct was impaired in any way?

Dr. Odon'dall: Yes, we used both routes.

Mr. Kohn: Which did you find the more convenient?

Dr. Odon'dall: Well, for motor transportation from the hospital to the ferry I don't know that it makes a great deal of difference. In time consumed I suppose it is about the same. We have used the Patterson street viaduct very often when the cars were running over the Newton street viaduct.

Mr. Kohn: Well, if you had to use the Patterson street viaduct from the Naval Station to get to a point in McDonoughville or Gretna, as a great many of our people do, which *they* would be the most convenient?

Dr. Odon'dall: The Newton street viaduct.

Mr. Kohn: Of course, you have no interest in the legal questions presented in this matter, but—

Dr. Odon'dall: The only interest I have in it, if I am allowed to state.—I would like to tell you what the interest is if I may.

Mr. Kohn: Certainly; go ahead.

Dr. Odon'dall: It is this: we have a civilian personnel, a number [fol. 107] of whom live in New Orleans. The fact that the street cars are not running over the Newton street viaduct necessitates our transporting these people from the ferry to the hospital and then taking them back again to the ferry at the end of the day; and with the limited transportation facilities we have at our disposal it has worked quite a hardship on us. We have at least forth such people, or more; and they have to be transferred from and to the ferry each day. They include doctors, stenographers, clerks, technicians and some other civil help,—attendants, etc. In addition to that we act as a clearinghouse for the whole Sixth District with our hospital. A great many patients come to us merely for examination. Now, those patients are supposed to be gotten over to the hospital on the street cars, but to come that way works quite a hardship on some of those patients; and because of the physical condition of some of those patients we prefer not to take a chance on their taking the street car route, as it is now operates, with that break in it over the Newton street viaduct,—and therefore we send to the ferry for them, and not let them walk over the viaduct.

Mr. Kohn: You mean that has been your procedure since the cars have not been running through?

Dr. Odon'dall: Yes, since the cars have not been running.

Mr. Kohn: Under those circumstances is not that an additional expense to the Public Health Service?

Dr. Odon'dall: Yes, naturally, because every time you use motor transportation your operating expenses are increased.

[fol. 108] Mr. Chaffie: You haven't gotten any more automobiles or hired any more drivers on that account, have you, Doctor?

Dr. Odon'dall: We have not, no.

Mr. Chaffie: As a matter of fact, Doctor, if the Newton street viaduct were in repair today and had been kept in repair there would not be any necessity for any other viaduct as far as you know, would there?

Dr. Odon'dall: As far as the operations of the hospital are concerned I cannot see why there should be. I speak, of course, only from the view point of the operations of the hospital. I cannot speak for the other people of the vicinity. The only interest we have in it is the transportation of our person-*el* to and from the ferry landing.

Mr. Chaffie: And the Newton street viaduct serves all those purposes?

Dr. Odon'dall: It did up to the time it got out of repair and in such condition that it could not be used.

Commissioner Williams: Doctor, you think, though, that a viaduct at Newton street is necessary?

Dr. Odon'dell: Transportation by street car, whether by Newton street or some other route,—I don't know that you would call it a necessity, but it is certainly desirable. It has worked a hardship on our station to have to transport these people back and forth to the ferry that were formerly transported to and from the ferry by street car. That much is certain.

Commissioner Williams: Have you ever made any observations as [fol.109] to the number of people living below the Newton street viaduct and in that neighborhood below there?

Dr. Odon'dall: No, sir, I have not; I have no idea.

Commissioner Williams: You are only acquainted with the hospital?

Dr. Odon'dall: Yes, I am very busy looking after my own troubles.

Witness excused.

[fol.110] Mr. J. R. NORMAN was called as a witness, and having been duly sworn, testified as follows:

Mr. Kohn: Mr. Norman, where do you live?

Mr. Norman: I live about five and a quarter miles below Algiers.

Mr. Kohn: Is there a good road leading all the way down to your place?

Mr. Norman: Well, I presume in this country you would call it a fair road but anywhere else it would be called a rotten road.

Mr. Kohn: Are there a great many vehicles from your place and all the way up that use that road coming into Algiers, passing over the Newton street viaduct, or was that the case before the viaduct went out of commission?

Mr. Norman: It was used continuously.

Mr. Kohn: Have you been able to go over the Newton street viaduct lately?

Mr. Norman: Well, I was absent for a couple months and just returned about a week ago and a few days after my return I understood the police had closed the Newton street viaduct. I have not tried to go over it since.

Mr. Kohn: Now, on your trips from your place to the city what route do you use,—the route through Behrman street or the Newton street viaduct?

Mr. Norman: I have always heretofore used the Newton street viaduct until it was closed to traffic, and even often used it during the time there was a sign there to the effect that it had been closed by order of the council and that persons traveling over it did so at [fol.111] their own risk. I did not because of the fact that the inconvenience of going around the front was so great. Not only did I do that personally, but my family as well continued to use the Newton street viaduct during the time that notice was posted there rather than suffer the inconvenience of the other route.

Mr. Kohn: This morning when you came up did you use the Newton street viaduct?

Mr. Norman: I did not.

Mr. Kohn: How far out of your way did you have to go, not being able to use the Newton street viaduct?

Mr. Norman: Well, the map would show that. I am unable to state it exactly.

Mr. Kohn: Well, about?

Mr. Norman: Possibly ten blocks or more, but I wish to say that the inconvenience to the people as a whole is far greater than that, for the reason that in my going to market, as well as other people living across the viaduct,—that is, on the east side,—what you might call East Algiers, because the Southern Pacific has Algiers cut in two, with no means of access or egress from one side to the other excepting over the one viaduct that is now left there, as all of the streets, if ever they existed, are closed. There are no streets open except over the one viaduct. The only street that sometimes people cross is below the present viaduct on the front and there is a sign there that the street is closed, but sometimes people disregard that ordinance and cross there anyway,—I have done it myself, often,—[fol. 112] not lately, but in former years,—but we have not other means of ingress or egress east and west of the tracks of the Southern Pacific Company in Algiers except over this one viaduct.

Mr. Kohn: They you consider that a viaduct or some opening of some sort is necessary for the people of the lower side of Algiers,—not only for the people who live down below there and who work on this side of the river, but for the farmers and everybody else down there who have occasion to go to and from Algiers.

Mr. Norman: Yes, especially as nearly everybody who lives in that section of the country lives immediately on or close to what is known as General Meyer Avenue, which is Newton street or a continuation of it. None live on the front. The front is empty. There are only two or three houses over there, but there are, of course, some people living in Algiers proper next to the viaduct but they cross also. I counted something like a hundred and odd houses down in that section a few days ago.

Commissioner Williams: How long have you lived down below the Newton street viaduct?

Mr. Norman: About 14 years, but I have owned property down there for 18 or 20 years.

Commissioner Williams: Have you any idea of the number of people living in that section from the shops down?

Mr. Norman: Well, I calculated that the other day, and I think [fol. 113] possibly in the neighborhood of Cut-off there are about 800 people; McClelandville must have 300 or 400 or 500 people; and then all of these people who live down in there, operating truck farms and gardens, who bring their stuff to market continuously. I suppose there are at least 40 or 50 families of them; and then when you reach the territory right back of the viaduct and up to the foot of the viaduct at Whitney Avenue, I counted something like a hundred and odd houses there,—new houses.

Mr. Chaffe: New houses?

Mr. Norman: Well, practically new, because it was almost entirely unsettled in there a few years ago,—I mean within the past few years, of course.

Mr. Chaffe: 10 or 15 years?

Mr. Norman: No, less than that. It has been building up very rapidly in there in the past four or five years. They again there was a new addition down there where I tried to count the houses but I couldn't, but there are a great many houses in the Oakdale subdivision, and they have, of course, to come up the same way. Some of them live as far back as the swamp and they, like everybody else, have to come clear around the front in order to reach the upper side of Algiers, which makes it something like forty or fifty blocks to travel if they should want to go to Gretna or anything like that?

Commissioner Williams: Are there any other streets leading from upper to lower Algiers.

[fol. 114] Mr. Norman: There are not streets at all. They are all closed. It is a unique condition, and one that I don't suppose exists any where else in the United States, whereby a railroad has been permitted to cut a town in two with its tracks and provide no means of crossing those tracks. I have just returned from a trip to Chicago, where I saw the Illinois Central and the Michigan Central Railroads entering the city for mile after mile on a raised bed, through territory that is thoroughly undeveloped; but for mile after mile those two railroads have constructed a raised road bed with passages through for the streets; and I don't suppose any development will ever take place down here unless you do something of the same sort, or at least, afford the public reasonably decent facilities for getting about to attend to their business. The only viaduct that we have to cross those tracks down there is down on the front and in bad shape. I called Mr. Maloney's attention to the condition of it two or three weeks ago. I complained to him about the condition of that viaduct. I told him that they had simply covered up the old lumber put in two or three years ago with short stuff, and I had the Times-Picayune come over and take a photograph of it; and within fifteen minutes the Southern Pacific had men there repairing it. It is repaired today with little pieces of plank two feet long and in such condition that it is dangerous for automobiles to pass over because in order to reach those short planks there are so many irregularities that it is apt to make you lose control of your car. That condition exists today. Those planks were placed over the old rotten planks, and they are absolutely rotten today, as anyone may [fol. 115] go and see for himself.

Mr. Kohn: What viaduct are you speaking of?

Mr. Norman: I am referring to the Patterson street viaduct now.

Mr. Kohn: In connection with the testimony of this witness I ask leave to file certified copies of the poll tax lists and the registration lists of the territory in Algiers below the Newton street viaduct.

Commissioner Williams: They may be filed.

Mr. Norman: I would like to be permitted to introduce in evi-

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lence a decision of the Supreme Court of the United States in support of the contention we make that this viaduct should be repaired and re-opened to traffic. There is an attorney who was to have been here today to present these decisions to the Commission, but he could not be present and under those circumstances I want to reserve the right to introduce them subsequently.

Mr. Chaffe: I don't want to object to Mr. Norman's testimony, but do I understand that the question of the condition of repair of the Patterson street viaduct is also being enquired into by the Commission.

Commissioner Williams: We are going into the question of the necessity for a viaduct at Newton street only, and in so far as the testimony concerning the condition of the Patterson street viaduct affects the necessity for a viaduct at Newton street it is admissible, but only admissible for that purpose.

Mr. Chaffe: But I would like to know what weight is to be given [vol. 116] to testimony concerning the Patterson street viaduct. If it is not to be disregarded then I wish to go into the matter at length.

Commissioner Williams: I will say this: that we will give consideration to the state of the Patterson street viaduct only in so far as it illustrates the necessity for a viaduct at Newton street. In other words, if the condition of the Patterson street viaduct is such as to impede the movement of traffic over it it makes it all the more necessary that the Newton street viaduct be promptly restored to a useable condition.

Mr. Chaffe: Very well. Now, Mr. Norman, how long has this Patterson street viaduct been in this so-called deplorable condition?

Mr. Norman: To my knowledge it has been continuously bad for about 14 years, and I have been continuously after the Mayor and ex-Mayor of the city of New Orleans, as well as the present Commissioner of Public Streets to get behind the company in regard to it.

Mr. Chaffe: And during all of that time it has been constantly used by vehicles?

Mr. Norman: No, sir, during the war and as long as the Newton street viaduct was kept in repair there was absolutely practically no use made of the Patterson street viaduct. All of the traffic went over the Newton street viaduct. It was the rarest thing in the world that a vehicle was seen crossing the Patterson street viaduct. I know that.

Mr. Chaffe: But there was, of course, some traffic over it?

[vol. 117] Mr. Norman: Practically none.

Mr. Chaffe: But there was some?

Mr. Norman: I said practically none,—it amounted to nothing.

Mr. Chaffe: Well, do you think as many as one or two a day?

Mr. Norman: Possibly as many as three or four or five a day.

Mr. Chaffe: How long has the Newton street viaduct been closed?

Mr. Norman: It has been absolutely closed only during the past two weeks or so, I believe.

Mr. Chaffe: Well, how long has it been partially closed?

Mr. Norman: Possibly for eight or ten months.

Mr. Chaffe: When you say partially closed just what do you mean?

Mr. Norman: I mean that there was a notice posted up there by the railway company and that they would not be responsible for any damages caused by anyone getting hurt in attempting to cross over this viaduct for the reason that it had been condemned and ordered closed by the city. However, in spite of that fact I, and the balance of the people living across the viaduct, due to the inconvenience of the Patterson street route, continued to use the Newton street viaduct and assume the risk.

Mr. Chaffe: Do I understand you to testify here, then, that in spite of the repeated complaints made by you to the former Mayor,— I suppose you mean Mr. Behrman?

Mr. Norman: I do.

Mr. Chaffe: In spite of your complaints to him and in spite of your complaints to the present Mayor and the Commissioner in charge of such property, and that extending over a period of 14 [fol. 118] years nothing has been done to put the Patterson street viaduct in a proper state of repair, and that it is now unsafe for traffic in your opinion?

Mr. Norman: You did not understand me; what I said was this: that during the past campaign one morning I got — of an automobile and went down to my knees through a hole.—I did that in getting out of the automobile. I went at once to Mr. Schaffer's and telephoned the Times-Picayune and they sent a reporter who took some photographs of that viaduct and its condition at the time. I then took the reporter back to the ferry station and returned, and within possibly fifteen minutes I was on my way home and as I passed there the Southern Pacific had their men out repairing the viaduct.

Mr. Chaffe: What campaign do you mean?

Mr. Norman: I mean the campaign in which Mr. Behrman was defeated for Mayor.

Mr. Chaffe: Well, I want to find this out: was Mr. Behrman a candidate for Mayor at the time?

Mr. Norman: I said it was when he was defeated for Mayor.

Mr. Chaffe: Well, what is the condition of it today?

Mr. Norman: It is bad.

Mr. Chaffe: What is wrong with it, in your opinion?

Mr. Norman: Well, the planks were rotten when they — removed, the were *were* allowed to remain there and the Southern Pacific instead of putting in planks to cover the entire viaduct put in planks [fol. 119] that lapped over and covered it about three feet on each side. These planks are laid irregularly,—some as much as eight or ten inches further than the others and they present jagged ends and naturally when people travel this route in automobiles they don't wish to cross upon ragged and jagged ends. When you said you understood me to say that I had complained to Mr. Maloney and it did no good you were in error. I said I complained to Mr. Maloney and he said he took it up with them and he said that the

Southern Pacific had covered the holes that were in existence at the time of the complaint.

Mr. Chaffe: That viaduct is considerably in use now?

Mr. Norman: It is the only one that is in use.

Mr. Chaffe: Have any automobiles had accidents there that you know of due to any defective condition of the viaduct?

Mr. Norman: I don't know that they have, but it requires very careful handling of a car.

Mr. Chaffe: Have any automobiles gone off that you know of?

Mr. Norman: Not that I know of.

Mr. Chaffe: Any accidents that you know of in the past fourteen years?

Mr. Norman: None that I know of, but I don't think it is necessary and proper to wait for an accident to occur before you make a complaint of an improper condition. Accidents ought to be prevented before they happen.

Mr. Chaffe: You live where?

Mr. Norman: Aurora Plantation.

[fol. 120] Mr. Chaffe: How big a plantation is it?

Mr. Norman: I have about 1,600 arpents.

Mr. Chaffe: I presume it is a plantation about like any other plantation, is it not?

Mr. Norman: It is.

Mr. Chaffe: Is not that country down there below the Naval Station pretty largely composed of big places?

Mr. Norman: They are almost small farms except my place. As a rule they are small farmers and truckers on an arpent or two or three. They are truck farmers largely.

Mr. Chaffe: Such farmers as you will find in that section generally,—the same sort of territory as you find down around Pointe à la Hache and in St. Bernard Parish?

Mr. Norman: I presume so. That condition exists all the way down from the east end of the Immigration Station, with the exception of this one settlement that I spoke of, where there are 700 or 800 people living right at the Cut-off.

Mr. Chaffe: So, as a matter of fact, while you are territorially and politically and technically within the limits of the city of New Orleans, as a physical fact you are out in the country, are you not?

Mr. Norman: That is true.

Mr. Chaffe: You have no water and sewerage down there?

Mr. Norman: I have no city water, no, sir.

Mr. Chaffe: No sewerage?

Mr. Norman: No, and no electric light service and no police protection.

[fol. 121] Mr. Chaffe: You are within the City of New Orleans in about the same way that Chef Menteur is within the city?

Mr. Norman: With the exception that I am 5-1/4 miles from New Orleans. My children work in New Orleans and come here every day except Sundays.

Mr. Chaffe: Now, if the Newton street viaduct had been kept in

repair and were in repair today there would be no necessity for any other viaduct, would there?

Mr. Norman: I rather think there would, for the convenience of the people. I think it should be somewhere,—I think ten blocks for a person to have to walk to get to a viaduct is entirely too far. Of course, that is entirely a matter of opinion, but I do know that the Newton street viaduct is a matter of a solute necessity.

Mr. Chaffe: Up to the time the Newton street viaduct got out of repair there was no complaint, was there?

Mr. Norman: Yes, sir, there was a continuous complaint.

Mr. Chaffe: By you?

Mr. Norman: No, because at that time I did not take the interest in matters in Algiers that I do now.

Mr. Chaffe: In other words, at that time you—

Mr. Norman: In other words, I was not as familiar with the conditions as I am now.

Mr. Chaffe: Then we will put it another way: as far as your personal use is concerned or the use of the people living below the viaduct is concerned the Newton street viaduct, when in repair amply supplies your needs and requirements, does it not?

[fol. 122] Mr. Norman: I would say for the present that it would answer our purposes.

Mr. Chaffe: General Meyer Avenue and Newton Street are one and the same street, are they not?

Mr. Norman: Wait just a moment, Mr. Chaffe. Did I understand you to ask me if the Newton street viaduct alone was sufficient?

Mr. Chaffe: Yes, sir.

Mr. Norman: Oh, no, because we should by all means have the Patterson street viaduct as well.

Mr. Chaffe: Oh, I take that for granted.

Mr. Norman: Then with that made clear my statement is correct.

Mr. Kohn: Mr. Chaffe asked you if all of the territory from the Immigration Station down was not farms,—small farmers as you find through the country. Now, above the Station there are some settlements, so-called. McClelandville is one. Is that thickly or sparsely settled?

Mr. Norman: It is thickly settled.

Mr. Kohn: Have they city water there, do you know?

Mr. Norman: Yes, sir, they have. I did not mean to give the impression that the people living below the viaduct are all farmers. On the contrary, ten to one are city living and working people. They are people living in houses, with four or five or six houses to the block.

Mr. Kohn: Now, immediately back of the Naval Station and below the foot of Newton Street,—that subdivision,—is that thickly settled?

[fol. 123] Mr. Norman: All of that is thickly settled, yes, sir.

Mr. Kohn: Do they have city water down there?

Mr. Norman: Yes, there is city water on General Meyer avenue but I don't know how far back it goes.

Mr. Kohn: Have they electric lights?

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Mr. Norman: Yes, they have both water and lights, because I saw them extending the mains on Whitney Avenue about two months ago.

Mr. Kohn: Is there a police station at McClellandville that you know of?

Mr. Norman: There is a policeman right there,—living there.

Mr. Kohn: Now, how is the rest of the way settled down there, thickly or sparsely settled?

Mr. Norman: Thickly settled, as a rule.

Mr. Chaffe: Don't you know as a matter of fact that there is merely a scattering of houses along General Meyer Avenue from the viaduct down?

Mr. Norman: No, it is not a fact. It is to the contrary,—from the east end of the viaduct.

Mr. Chaffe: What do you call the east end?

Mr. Norman: The lower end,—from the lower end of the viaduct a point a little below the gate of the Naval Station it is rather thickly settled. It is thickly settled in the shape of a triangle, running from the front,—running from the front back. That is where I told you I counted over ninety houses or buildings.

Mr. Chaffe: What sort of residences are they?

Mr. Norman: Well, residences that decent people would care to live in.

Mr. Chaffe: You say you counted ninety of them?

Mr. Norman: I think more.

Mr. Chaffe: That you counted?

Mr. Norman: Yes, I counted them, and while I would not like to have those figures considered as absolutely correct they are approximately correct.

Mr. Chaffe: I want to ask the presiding Commissioner to go down and inspect the location, in company with representatives of our company and representatives of the complainants,—we will furnish machines.

Commissioner Williams: I have already inspected the viaduct, Mr. Chaffe, but we will be glad to go down there again and look the territory over.

Witness excused.

125] Mr. PETER S. LAWTON was called as a witness, and, having been duly sworn, testified as follows:

Q. Kohn: Mr. Lawton, where do you reside?

A. Lawton: I reside now on Prytania street, in this city.

Q. Kohn: Have you at any time lived in Algiers?

A. Lawton: Practically all my life, yes.

Q. Kohn: Have you any real estate holdings over on that side of the river?

A. Lawton: Not at present.

Q. Kohn: I mean during the time you lived there?

A. Lawton: Oh, yes, rather extensive holdings.

Mr. Kohn: Where was the land you were interested in situated with respect to the Newton street viaduct?

Mr. Lawton: Well, I can show that better by a map.

Commissioner Williams: Will you offer the map in evidence?

Mr. Kohn: We will offer it in connection with Mr. Lawton's testimony, yes.

Commissioner Williams: All right.

Mr. Kohn: Mr Lawton, this heavy white line showing the Southern Pacific Railroad Company's unbroken fence line,—is that fence along the line of their original holdings of the Southern Pacific or is it along the line of holdings that they have acquired since then in various ways?

Mr. Lawton: No, sir, the original holdings were 375 feet on the Mississippi River by 15 arpents in depth. That was bought by the [fol. 126] New Orleans, Opelousas and Great Western Railroad in 1852. In addition to this map—

Mr. Kohn: Does the map show any other land acquired or that was acquired at about the same time the agreement for the Newton street viaduct was entered into?

Mr. Lawton: It shows land that was acquired subsequent to the erection of the Newton street viaduct. This map does not show all of that, however,—it does not show all that the company acquired. It acquired ten streets.

Mr. Kohn: What street is on the west of the Southern Pacific holdings?

Mr. Lawton: Verret street, or Verret Avenue, rather.

Mr. Kohn: Was that always a public thoroughfare?

Mr. Lawton: Yes, it was dedicated in 1852.

Mr. Chaffie: I object to that on the ground that the dedication itself is the best evidence.

Mr. Kohn: We will reserve the right to offer the dedication in evidence.

Commissioner Williams: It can be filed later.

Mr. Kohn: To your knowledge, Mr. Lawton, was Verret or not an open street?

Mr. Lawton: I think it was up until the company built—

Commissioner Williams: Mr. Kohn, what bearing would that have on the Newton street viaduct?

Mr. Kohn: If the Commissioner doesn't think it has any bearing, I won't press it.

[fol. 127] Commissioner Williams: I don't think it has much bearing, if any.

Mr. Kohn: All right. Now, Mr. Lawton, this map shows that to be a continuous strip of land. Are there any crossings over that strip of land held by the Southern Pacific Railroad from the upper to the lower part of Algiers?

Mr. Lawton: Do you mean streets or crossings?

Mr. Kohn: Are there any means of crossing that strip of land held by the Southern Pacific Railroad by public thoroughfare other than the Newton street viaduct?

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Mr. Lawton: Only the two, the Newton street viaduct and the Peterson street viaduct; and the Newton street viaduct is now closed and cannot be used.

Mr. Kohn: Now, if the Newton street crossing was permanently closed and no grade crossing was established there, would that be a matter of great inconvenience to the people on both sides of the Northern Pacific tracks in going back and forth from one section to the other?

Mr. Lawton: Why, that is obvious.

Mr. Kohn: Now, what land are you interested in there?

Mr. Lawton: I was interested in this track here,—the Coyle track, about five squares below the shops.

Mr. Kohn: Was that land readily sold without any passage way to the rear, Mr. Lawton?

Mr. Lawton: Well, I sold three hundred lots out of this track for owners, which was the Slaughter House Company,—and every lot [128] purchase of that land was predicated upon this viaduct being constructed. It was under construction at the time I sold the lots, and it was sold not only predicated upon the viaduct being constructed but that it would be maintained by somebody.

Mr. Kohn: Which do you consider the better crossing there,—a viaduct or a surfact- or grade crossing?

Mr. Lawton: Well, there should be both. Now, in the case of loading heavy machinery you cannot cross that viaduct, nor the viaduct on the front either. Mr. Norman, of Aurora Plantation, had a great deal of machinery that had to be carried down there and it had to be transported over a surface opening and it was a very difficult proposition. He never could have carried that heavy machinery over the viaduct. It would be out of the question. So if factories wanted to locate down there and front street was in bad condition it would be impossible to get machinery down there except by boat.

Mr. Kohn: About what is the value of the land you disposed of predicated upon the building and maintenance of this viaduct?

Mr. Lawton: Something over \$6,000,000 worth of lots were sold.

Mr. Kohn: Are you familiar with the Hero tract of the tract of Hero Development Company that is back behind in the swamp?

Mr. Lawton: Yes, sir. That is the Olivier tract.

Mr. Kohn: Are there any houses there?

Mr. Lawton: A great many.

Mr. Kohn: Then you consider that a viaduct or a surfact crossing would be several surfact streets open besides that—there should be [129] convenient place?

Mr. Lawton: I consider that the Newton street viaduct should be repaired and put in absolutely first class condition, and that there should be several surface streets open besides that—there should be one on the rear, to give the people of the Oakdale sub-division, for instance, a chance to get through somewhere without having to go the way up to the front. There should be a street opened to give

those people another way of getting out, and to permit the handling of heavy machinery and stuff like that, as I stated.

Mr. Kohn: Have you any photographs, Mr. Lawton, showing the development in that section down there?

Mr. Lawton: Yes, I have some photographs here. This is a photograph of the whole section, as far as the camera would reach.

Commissioner Williams: Is this looking up or down?

Mr. Lawton: This is looking down. Here is another one three years old. That is taken from the viaduct.

Mr. Kohn: We will offer these photographs in evidence.

The documents so offered and identified were thereupon received in evidence and marked "Lawton 1" and "Lawton 2").

Commissioner Williams: Where is the tract that you developed?

Mr. Lawton: Right in here, about five squares below the Southern Pacific shops. I have photographs of that also. It is a very large tract. It was known as the Coyle tract. I sold 300 lots out of it.

Mr. Kohn: We will offer the map in evidence.

(The document so offered and identified was thereupon received in evidence and marked "Lawton 3").

[fol. 130] Mr. Chaffe: The map that you have been testifying to is a map made by C. Uncas Lewis, deputy city surveyor, dated March 21, 1906, is it not?

Mr. Lawton: Yes, sir.

Commissioner Williams: Of course, this only shows the ground there,—it doesn't show the houses and buildings and the people living there?

Mr. Lawton: No, just the ground.

Mr. Kohn: Are there any people living on that particular tract?

Mr. Lawton: Yes, sir, a great many people living on it. There are a number of houses there.

Mr. Kohn: Are you familiar with the Oakdale subdivision?

Mr. Lawton: No, I am not so familiar with it. I know where it is located, of course, but that is about all.

Mr. Kohn: Is it thickly or thinly settled to the rear of the Adolphy Meyer school, along Behrman Avenue, on down to Cornus Lane?

Mr. Lawton: Well, I would say, taking in the Verret Canal subdivision and everything from the Southern Pacific fence down to say, a line drawn from the lower end of the Naval Station to the end of the open land there must be at least 250 houses.

Mr. Chaffe: When did you make these sales that you spoke of for the Slaughter House people,—in what year?

Mr. Lawton: 1907, 1908 and 1909, and over into 1910.

Mr. Chaffe: Do you remember how many lots there are in that tract that you say you sold 300 lots out of?

Mr. Lawton: I think something like 400, all told. That is my recollection.

[fol. 131] Mr. Chaffe: So you sold all but about one hundred?

Mr. Lawton: Yes, sir.

Mr. Chaffe: The last sale being made some time in 1910?

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Mr. Lawton: Yes, possibly there were a few made along in 1911, there were any sold in 1911, however, it was only a few.

Mr. Chaffe: How many of those lots did you have to take back?

Mr. Lawton: Why, there was 49, I think. Mr. Pipes owns now the remaining ones.

Mr. Chaffe: Would you say as to whether or not that tract that I refer to is or is not thickly populated except for the tier of houses along Newton street?

Mr. Lawton: It is populated along Newton street on both sides, then on back there are a few houses. There are a few houses on the front but not near as many as on the rear.

Mr. Chaffe: Well, for example, would you say between Horner street and the river it is thickly populated and settled?

Mr. Lawton: No, I would not.

Mr. Chaffe: What would you say?

Mr. Lawton: I would say it was thinly settled. That is where the 49 lots came back from.

Mr. Chaffe: Are there any factories below the Southern Pacific on the other side of the river?

Mr. Lawton: No, and I think the reason they are not there is only because of that dead-wall that the Southern Pacific has built from the river to the woods.

Mr. Chaffe: That they cannot carry machinery over?

132] Mr. Lawton: I say that they absolutely cannot transport any machinery over it, yes, sir.

Mr. Chaffe: And you urge that as the reason why no factories have been established there?

Mr. Lawton: I will not go that far.

Mr. Chaffe: Well, that is what you said a moment ago.

Mr. Lawton: What I mean is this: That that would deter anybody from putting a factory down there. There may be other reasons why there are none there also, but certainly that would be an incentive.

Mr. Chaffe: But you volunteered the statement in your direct examination that there was difficulty in getting heavy machinery on one side of the Southern Pacific property to the other and that was the reason why there were no factories on the other side of the river. Now I want to find your authority for that statement.

Mr. Lawton: The foundation for it is the difficulty that Mr. Norman had in transporting his machinery to his place. It took six and seven mules to handle some of those wagons; and they never could get them over the viaduct.

Mr. Chaffe: But they did get the machinery down there?

Mr. Lawton: They did.

Mr. Chaffe: How?

Mr. Lawton: By Front street.

Mr. Chaffe: It is an open street, is it?

Mr. Lawton: Yes, but generally it is in bad condition.

133] Mr. Chaffe: Well, that would probably be a perfectly adequate complaint to carry to the city authorities for permitting it to get into such condition, just as people in the country make complaints to make the public authorities about the bad condition of some roads, but—

Mr. Lawton: Well, it is quite a distance, Mr. Chaffe, also.

Mr. Chaffe: Well, let's see about the distance. How much longer a haul would it be from the Canal street ferry landing to Mr. Norman's place by way of Patterson street than it is by way of Newton street, in your opinion?

Mr. Lawton: I have never measured it but I can count the number of squares if you want me to.

Mr. Chaffe: About how far?

Mr. Lawton: There are about 12 squares to the lower end of the Patterson street viaduct,—about 12 squares from here to here, to the end of the Patterson street viaduct.

Mr. Chaffe: The map you have offered in evidence shows 8.

Mr. Lawton: But when you come up here by Behrman Avenue you have to count these squares.

Mr. Chaffe: Then you say in counting 12 squares you would come up Newton street toward the river?

Mr. Lawton: Yes, sir.

Mr. Chaffe: Patterson street, rather?

Mr. Lawton: Yes, sir.

Mr. Chaffe: And then go on up the river on Patterson street; you think that is a fair method of calculating it, do you?

[foi. 134] Mr. Lawton: There is no other means of getting there if the Newton street viaduct is out of business.

Mr. Chaffe: Then in your judgment there would be an additional haul of 12 squares. Is that what you mean?

Mr. Lawton: I will not say that; I say it takes about 12 squares to reach down to the foot of the viaduct. I don't know what the distance is from there to the Canal street ferry.

Mr. Chaffe: But don't you know as a matter of fact that you would have to traverse the same up and down distance by Newton street as by Patterson street?

Mr. Lawton: No, sir, because you come along diagonally.

Mr. Chaffe: But this map doesn't show that?

Mr. Lawton: No, sir, but another map does.

Mr. Chaffe: What I want to know is this: how many more squares would you have to travel if you used the Patterson street viaduct than if you used the Newton street viaduct?

Mr. Lawton: It is 23 blocks by the Patterson street viaduct and 21 blocks by the Newton street viaduct.

Mr. Kohn: Now, Mr. Lawton, those distances are figured from points on Newton street and Behrman Avenue to the Canal street ferry?

Mr. Lawton: Yes, sir.

Mr. Kohn: Now, if it were necessary for a man, say, in Gretna or McDonoughville to go to the Naval Station, without any crossing there at Newton street, how many blocks out of his way would he [fol. 135] have to go to reach his destination?

Mr. Lawton: He would have eight squares out of the way to go each way.

Mr. Kohn: Eight each way?

Mr. Lawton: Yes, sir.

Mr. Chaffe: Mr. Lawton, the map which you have been referring to is the map which I have in my hand?

Mr. Lawton: Yes, sir.

Mr. Chaffe: I will mark that "Morgan Company Exhibit 1" and I will offer it in evidence in lieu of the map of the city that I was going to offer.

(The document so offered and identified was thereupon received in evidence and marked "Morgan Company Exhibit 1").

Commissioner Williams: Mr. Lawton, do you know as a matter of fact of any industry or development on the other side of the Southern Pacific tracks in Algiers by reason of the fact that there are not enough streets or enough viaducts leading from the upper to the lower end of the town? I want to know it if you know it as a matter of fact, but not opinion?

Mr. Lawton: I have no personal knowledge of any factory that has not gone there because the streets are not opened, no.

Mr. Chaffe: As a matter of fact, Mr. Lawton, the Naval Station is six blocks below the Southern Pacific shops, is it not?

Mr. Lawton: Yes, sir.

Mr. Chaffe: And it effectually blocks all of the streets between Newton Street and the river, does it not?

[fol. 136] Mr. Lawton: It does, yes.

Mr. Chaffe: So even if any streets were opened or more viaducts were built, or all of them were opened, it could not serve any thing except a space six blocks in one direction and seven in the other, could it?

Mr. Lawton: Well, plus the Naval Station.

Mr. Chaffe: Well, the Naval Station has not complained about the lack of facilities.

Mr. Lawton: But I know that the Naval Station did complain and complain betterly. I was ten years on the Naval Base Committee of the Board of Trade, and I know. You wanted me to say that those streets only went to the Naval Station.

Mr. Chaffe: Well, that is the fact, is it not?

Mr. Lawton: Yes, it is, but the Naval Station is a big proposition.

Witness excused.

[fol. 137] Mr. E. W. BURGIS was called as a witness, and, having been duly sworn, testified as follows:

Mr. McCaleb: Mr. Burgis, what position do you occupy?

Mr. Burgis: President and general manager of the South New Orleans Light and Traction Company.

Mr. McCaleb: What is your profession, Mr. Burgis?

Mr. Burgis: Civil and mechanical engineer.

Mr. McCaleb: How long have you lived in Algiers, or the Fifth District of New Orleans?

Mr. Burgis: 37 years.

Mr. McCaleb: Mr. Burgis, have you had any photograph taken of the Newton street viaduct and the territory in the vicinity of that viaduct? I show you pictures marked from "1" to "12," inclusive?

Mr. Burgis: Yes, I had these pictures taken.

Mr. McCaleb: On what date were they taken?

Mr. Burgis: On Sunday, October 2, 1922. I accompanied the photographer when he took the pictures.

Mr. McCaleb: In connection with the testimony of the witness we offer in evidence the pictures identified by the witness, marked "Burgis 1."

(The documents so offered and identified were thereupon received in evidence and marked "Burgis 1.")

Mr. McCaleb: In looking at Exhibit or Picture 10 I notice that the foundations of the piers of the viaduct are shown. On what street or property are those foundations as shown in that picture? [fol. 138] Mr. Burgis: On Newton street.

Mr. McCaleb: Are there any foundations or piers located on the property traversed by the Southern Pacific tracks between Verret Avenue and Thayer Avenue?

Mr. Burgis: There are.

Mr. McCaleb: Can you state approximately how many?

Mr. Burgis: I don't know the exact number, but they are numerous, and the columns resting on those foundations are shown in photograph No. 11.

Mr. McCaleb: Are there any spans in the Newton street viaduct?

Mr. Burgis: There are sixty-one spans of trestle work, on steel trestles.

Mr. McCaleb: In what portion of the viaduct are the greatest spans?

Mr. Burgis: The longest spans, you mean?

Mr. McCaleb: Yes, sir.

Mr. Burgis: The longest spans in the steel trestle are over the property known as the original holdings of the Southern Pacific Company, or the M. L. & T. R. R. & S. S. Company.

Mr. McCaleb: Is that the part where the tracks of the Southern Pacific are located?

Mr. Burgis: Yes, sir.

Mr. McCaleb: Which is the highest portion of the viaduct, taking it from the ground up to the decking of the viaduct,—at what part of the structure itself?

[fol. 139] Mr. Burgis: At that portion of the viaduct which crosses the original holdings of the Southern Pacific Company. That is where the greatest clear height of the viaduct is.

Mr. McCaleb: As an engineer, do you know the purpose of that?

Mr. Burgis: To permit the passage of locomotives and freight and passenger cars and to give sufficient clearance for a man standing on top of those cars.

Mr. McCaleb: Now, Mr. Burgis, I show you a map which I will mark "Burgis Exhibit 2," and I ask you—

Mr. Chaffe: I object to the introduction of that map or any reference to it, for the reason that it is not correct, in that it purports to show streets laid out across the original holdings of the Morgan Railroad between Thayer Avenue and Verret street, whereas, in truth and in fact, no streets have ever been laid out across that strip of land.

Commissioner Williams: The question as to whether the map is correct or not is a matter of fact. You will have to prove by evidence that it is incorrect, because your mere statement does not make it so.

Mr. Chaffe: But if a man introduces a document in evidence he has to prove the correctness of it.

Mr. McCaleb: This is to show the location of the viaduct and how many tracks of the Southern Pacific run underneath it. It has nothing to do with the streets, or anything of that kind.

Mr. Chaffe: I object to counsel stating his purposes in using and referring to the map until he has proven the correctness of it.

[fol. 140] Mr. McCaleb: I have a right to refer to it as a map or anything else that I want to.

Commissioner Williams: The objection is overruled, reserving to counsel for the Southern Pacific the right to offer evidence to prove the incorrectness of the exhibit.

Mr. McCaleb: We offer it.

(The document so offered and identified was thereupon received in evidence and marked "Burgis Exhibit 2.")

Mr. McCaleb: Now, Mr. Burgis, how many tracks of the Southern Pacific Railroad go underneath the central portion of that viaduct at its highest point?

Mr. Burgis: Twenty-two.

Mr. McCaleb: Twenty-two tracks?

Mr. Burgis: Yes, sir.

Mr. McCaleb: Do you know how many tracks are used by the Southern Pacific for main line purposes or traffic?

Mr. Burgis: I do not know.

Mr. McCaleb: What is the length of the Newton street viaduct from approach to approach?

Mr. Burgis: The Newton street viaduct extends from the east side of Minor Avenue to the West side of Whitney Avenue, a distance of 1,977 feet.

Mr. McCaleb: Now, on this map I notice some blue pencil marks or lines,—shaded blue pencil lines. What do they represent?

Mr. Burgis: The line of city blocks between Verret Avenue and Atlantic Avenue which were formerly separated by cross streets and [fol. 141] which are not now so separated, but are enclosed in a fence extending along Atlantic Avenue, and are enclosed within the Southern Pacific's property lines.

Mr. McCaleb: What do the green shaded lines indicate?

Mr. Burgis: A line of city blocks or strip of land between Verret Avenue and Thayer Avenue, which were the original holdings of the M. L. & T. Railroad, and used by them for railroad purposes.

Mr. McCaleb: I show a document to you which I will mark "Burgis Exhibit 3," and I ask you to state what it is?

Mr. Burgis: This shows Algiers, McDonoughville and Gretna. It shows the location of the United States Government reservation. It shows the street railway in red lines. It shows the Newton street viaduct in yellow and the Patterson street viaduct in yellow; and it shows the strip of land occupied and used by the M. L. & T. Railroad at the present time between Thayer and Atlantic Avenues. It also shows the location of the Algiers Naval Station, the United States Public Health Service Veterans' hospital, and the Immigration Station.

Mr. McCaleb: We offer the map in evidence.

(The document so offered and identified was thereupon received in evidence and marked "Burgis' Exhibit 3.")

Mr. McCaleb: I show you a map which I will mark "Burgis Exhibit 4." Does the typewritten statement attached to the map exhibit in words what the map shows?

Mr. Burgis: In connection with this map I would like to say it is entitled "Algiers Lighting Circuit." It purports to have been made by the Orleans Engineering Company, of New Orleans, and is [fol. 142] dated August 2, 1902. I have no knowledge of its value other than having found it among the records of the company, or in the company's archives.

Mr. Chaffe: I renew our objection to any reference to this map unless the verity of the map be shown.

Commissioner Williams: Mr. Burgis has been asked if this map shows what he says it shows in the typewritten statement annexed to the map. Mr. Burgis swears to the correctness of the statements which he makes in this added to the exhibit, and, so far as this exhibit is concerned, the Commission is interested only in the correctness of the statements in the memoranda attached to the map.

Mr. Chaffe: I object to the typewritten statements being considered, because the proper way to bring out testimony is to ask the witness questions so objections can be urged as those questions are asked. I further object to the typewritten statement because it purports to state as a fact what is shown on the map and Mr. Burgis himself says that he does not know whether the map is correct or not. Mr. Burgis, do you swear to the correctness of these statements in this document attached to the map?

Mr. Burgis: I do.

Commissioner Williams: I think, however, in order to get around Mr. Chaffe's objections that Mr. McCaleb should take this memoranda and ask the witness questions concerning it, in order that Mr. Chaffe may object to them if he cares to, or cross examine on them.

Mr. McCaleb: I will withdraw it for the time being.

[fol. 143] Mr. McCaleb: I show you a map, Mr. Burgis, entitled "M. L. & T. R. R. & S. S. Co.—Algiers yards," and I ask you where this map came from?

Mr. Burgis: I found it in the archives of my company. That map is dated July, 1906.

Mr. McCaleb: Was that before the Newton street viaduct was built or afterwards?

Mr. Burgis: One year before it was built.

Mr. McCaleb: What does his map indicate?

Mr. Burgis: It indicates that the Southern Pacific Company was in possession of a strip of ground, as shown on the map, from the river to beyond Lamarque street, and from Verret Avenue on the upper side of Thayer Avenue on the lower side.

Mr. McCaleb: Where do all these streets abut? Thayer street, Mcc Street? Opelousas Street, Slidell street, Elm Street, Newton street, etc.?

Mr. Burgis: Those streets abut on Verret Avenue on the upper side and other streets are shown as extensions of those streets on the lower side of the M. L. & T. property, abutting on Thayer Avenue.

Mr. Chaffe: But those streets are not indicated as crossing the Southern Pacific property, are they?

Mr. Burgis: They are not indicated as crossing the Southern Pacific property on this map?

Mr. McCaleb: We offer the map in evidence.

[fol. 144] (The Document so offered and identified was thereupon received in evidence and marked "Burgis Exhibit 5.")

Mr. McCaleb: Do you know when the Newton street viaduct was built, Mr. Burgis?

Mr. Burgis: It was built in 1907.

Mr. McCaleb: Do you know for what purpose?

Mr. Burgis: To carry Newton street as a public highway for vehicles and pedestrians and other traffic over the property of the M. L. & T. Company.

Mr. McCaleb: What is the approximate distance today from Newton street abutting on Verret Avenue, to Newton street abutting on Thayer Avenue?

Mr. Burgis: 375 feet.

Mr. McCaleb: Then what are the boundaries of the Southern Pacific's property from the woods or the swamp to the river?

Mr. Burgis: What are the boundaries today?

Mr. McCaleb: Yes, sir.

Mr. Burgis: Atlantic Avenue on the west side and Thayer Avenue on the east side.

Mr. McCaleb: What were the boundaries in 1907, when the Newton street viaduct was built?

Mr. Burgis: Verret Avenue on the west side and Thayer Avenue on the east side.

Commissioner Williams: Verret is between Atlantic and Thayer?

Mr. Burgis: Yes, sir.

Mr. McCaleb: On what street, prior to the building of the Newton street viaduct, if any, did the main line of the Southern Pacific [fol. 145] traverse?

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Mr. Burgis: The main line of the M. L. & T.?

Mr. McCaleb: Yes, what street, if any?

Mr. Burgis: It traversed Verret Avenue.

Mr. McCaleb: From the river?

Mr. Burgis: From the river, yes, sir.

Mr. McCaleb: Back?

Mr. Burgis: Yes, sir, back.

Mr. McCaleb: Now, before the construction of the Newton Street viaduct what street was there which crossed the property of the Southern Pacific Company?

Mr. Burgis: Patterson street,—the first street from the river.

Mr. Caleb: How far is Newton street from Patterson Street?

Mr. Burgis: Nine blocks, making Newton the tenth block from the river.

Mr. McCaleb: Do you know why the Newton street viaduct was built?

Mr. Burgis: In order to provide a highway in a direct line with a road that was established on the rear of the Naval Station, that road to cross the Southern Pacific property and lead into the central portion of Algiers. I may state that the road in the rear of the Naval Station now known as General Meyer Avenue was built to take the place of the original traffic road or route of Patterson street. It was called the levee road, or public road, next to the river. Now, when [fol. 146] the government took over the tract of land known as the Naval Station it was considered advisable to close that levee road, and by arrangement between the United States government and the city of New Orleans a road was built on the rear or to the rear of the Naval Station; and also a road was built from the river to the upper end of the Naval Station to connect the road so built at the lower end of the Naval Station, connecting the rear and front roads, in order to keep traffic from crossing the Government reservation near the levee.

Mr. Chaffe: The upper street is called Behrman Avenue, is it not?

Mr. Burgis: The street on the upper end of the Naval station is called Behrman Avenue, yes, sir, and the street on the lower end is called Merrill Avenue.

Mr. McCaleb: Prior to the building of the Newton street viaduct where did all vehicular traffic, as well as pedestrian traffic, pass in order to cross from the east side to the west side of Algiers?

Mr. Burgis: Either on the surface crossing at Patterson street or over the Patterson street viaduct, in so far as vehicles were concerned. As to pedestrians, I am told,—well, I don't know.

Mr. McCaleb: Can you state about how many vehicles passed over the Newton Street viaduct while it was in operation, approximately?

Mr. Burgis: Not of my own knowledge. The City engineer has a census of that I understand.

Mr. McCaleb: Well, generally speaking, was the traffic heavy or light?

[fol. 147] Mr. Burgis: Traffic of all kinds passed over the Newton street viaduct, pedestrians, automobiles, automobile trucks, bug-

gies, farm wagons, lumber wagons, and some of the heaviest trucks that are permitted on the streets of New Orleans. I have a statement which I would like to submit in evidence of one instance of *of* an extremely heavy load which passed over the Newton street viaduct—a load so heavy that it was refused passage at the Canal street ferry and was refused passage at the Third District ferry; was refused passage at the Gretna ferry and at the Harvey ferry, and finally crossed the river at Amesville and then came down the river from Amesville and crossed the Newton street viaduct, crushing through the three-inch plants on that bridge, so that it had to be jacked up.

Mr. Chaffe: But it didn't hurt the viaduct at all?

Mr. Burgis: It crushed through the flooring.

Commissioner Williams: I don't believe that is particularly relevant to the proceeding.

Mr. Burgis: No, it is not except to indicate the varied character of traffic using the viaduct.

Mr. Chaffe: And also it shows that there is a good strong viaduct there.

Mr. Burgis: Possibly so.

Mr. Chaffe: I notice you failed to mention street cars as forming any part of the traffic over the viaduct? That was doubtless oversight?

Mr. Burgis: It was; there is street car traffic also. The traffic is [fol. 148] as varied in character as on any street in the city of New Orleans.

Mr. Kohn: Ther fire apparatus also uses it?

Mr. Burgis: That is true, yes.

Commissioner Williams: Comparatively speaking, would you say that the traffic over the Newton street viaduct was equal to or heavier than or lighter than the traffic on one of the principal traffic thoroughfares of New Orleans.—say Burgundy street, down town?

Mr. Burgis: Not as heavy as on Burgundy street, I would say, no, sir.

Commissioner Williams: But was the traffic heavy or light?

Mr. Burgis: It was probably heavier than on any other street in Algiers. The Newton street viaduct was probably the heaviest traffic point in Algiers.

Mr. McCaleb: After the Newton street viaduct was built what became of the vehicular traffic that formerly went over the Patterson street viaduct?

Mr. Burgis: It was almost entirely diverted to the Newton street viaduct. It was a rarity to see a vehicle passing over the Patterson street viaduct.

Mr. McCaleb: Mr. Burgis, it is admitted, I think that the Newton street viaduct has been condemned by the city engineer or by the city authorities. That is correct, is it?

Mr. Burgis: That is correct.

[fol. 149] Mr. McCaleb: Do you know what portion or portions of the viaduct shows the greatest depreciation?

Mr. Burgis: Yes, the point of the failure in the viaduct is imme-

diately over a track which is about half way between Verret Avenue and Thayer Avenue, and which track is used more than any other of the numerous tracks of the railroad there in switching and train operations.

Mr. McCaleb: Do locomotives pass under that part of the Viaduct frequently?

Mr. Burgis: Very frequently.

Mr. McCaleb: As an engineer can you give the reason for that part of the viaduct depreciating more rapidly than other portions, and the cause for it?

Mr. Burgis: In my opinion the cause was the escape of gases from locomotives, which gases were held an unnecessarily long period of time underneath the decking of the viaduct by reason of the peculiar type of construction of the viaduct. Those gases are very corrosive and rapidly attack steel work.

Mr. Chaffie: That is known by everybody?

Mr. Burgis: It is, yes, sir, almost universally known.

Mr. Chaffie: And has been known for generations?

Mr. Burgis: I presume so; I have known it many years.

Mr. Chaffie: Is there any difficulty in repairing the sub-structure of the Newton Street viaduct without suspending traffic or without going upon the property of the Southern Pacific?

Mr. Burgis: It would be impracticable to repair the columns or [fol. 150] supporting posts of the viaduct without going on the property of the Southern Pacific Railroad. The flooring system of the viaduct, by which I mean to say the steel work which supports the decking, in many of its parts,—I may say in most of its parts,—cannot be repaired and never could be repaired without taking up the decking, thereby closing the highway to traffic, and without taking up the street car tracks, thereby closing the line to the passage of street cars.

Mr. McCaleb: Mr. Burgis, if there was no viaduct crossing the property of the Southern Pacific at Newton street, what have you to say of the danger to the public, and the delays and inconvenience to the public, in case of a grade crossing there?

Mr. Burgis: Grade crossings are always regarded as sources of danger. They are known to be a source of delay to the Public by reason of the passing of trains. The danger arises from the fact that where a large number of tracks cross a highway and there are freight cars parked on each side of those tracks,—one each side of the highway,—the track or tracks that are kept open for the passage of trains cannot be entirely protected by any known flagging system.

Mr. McCaleb: If there should be a grade crossing at Newton street over the Southern Pacific tracks what would be the cost of maintaining such a grade crossing over twenty two tracks?

Mr. Burgis: I could not say without first making figures and estimates.

Mr. McCaleb: Would it be necessary to have a flagman?

[fol. 151] Mr. Burgis: Presumably so. That would be for the city authorities to determine.

Mr. McCaleb: Mr. Burgis, have you received an estimate from the engineer of the Southern Pacific as to what it would cost to repair the Newton street viaduct?

Mr. Burgis: I have, yes, sir.

Mr. McCaleb: Will you state what it is, or product it?

Mr. Burgis: I have here a copy of an estimate made by H. H. Veckert, engineer of structures of the Southern Pacific Lines. This estimate of the cost of repairs to the structural steel work on the Newton street viaduct was sent to Mr. Klorer, the city engineer, who furnished me this copy.

Mr. McCaleb: We will offer the estimate in evidence.

(The document so offered and identified was thereupon received in evidence and marked "Burgis Exhibit 6").

Mr. McCaleb: Did you receive at any time any notice from the Southern Pacific Railroad as to the condition of the Newton street viaduct?

Mr. Burgis: Yes, I received two letters, one dated November 11, 1921, signed by Mr. E. K. Legendre, B. & B. superintendent; and another one dated in December, 1921. I would like to state in connection with that that the matter of the restoration or repair of the Newton street viaduct was then under negotiation with the city officials.

Mr. Chaffe: Negotiations between your company and the city authorities?

[fol. 152] Mr. Burgis: Yes, sir.

Mr. McCaleb: We will offer the letters in evidence.

(The document so offered and identified were thereupon received in evidence and marked "Burgis Exhibit 7" and "Burgis Exhibit 8").

Mr. McCaleb: Do you know of any request on the Southern Pacific Company in connection with the negotiations had with the city engineer or the city authorities relative to a temporary shoring of the viaduct for the purpose of having the question determined the meantime as to liability for the permanent repair and maintenance of the viaduct?

Mr. Burgis: Yes, in the early part of July, 1922, when it was known that the Newton street viaduct was in a dangerous condition and the South New Orleans Light and Traction Company was desirous of continuing the operation of its cars provided some method could be found whereby they could be allowed to cross the viaduct safely. At the request of Commissioner Black,—Commissioner of Public Property, the city engineer, Mr. Klorer, made a survey. I accompanied him at the time; and I have a copy here of a report which was made to Commissioner Black, in which he states that temporary shoring or under-pinning could be put in at an expense of approximately \$1,000.00 to \$1,200.00.

Mr. Chaffe: I object to any reference to the report or to the report

itself, for the reason that the report has never been communicated to us.

Mr. McCaleb: I will have the city engineer testify on that.
[fol. 153] Commissioner Williams: You can ask him whether any steps were taken to bring about temporary relief.

Mr. Burgis: Well, this was communicated to me by Commissioner Black.

Mr. McCaleb: What was?

Mr. Burgis: The report of Commissioner Black, or, rather the report of Mr. Klorer to Commissioner Black.

Mr. McCaleb: What did Mr. Black communicate to you?

Mr. Burgis: I have it here.

Mr. McCaleb: Just in so many words, Mr. Burgis.

Mr. Chaffe: I object to what he recommended to this witness. That has nothing to do with our liability.

Commissioner Williams: All the Commission is interested in is arriving at the necessity or lack of necessity for a viaduct at Newton street in Algiers. That is the only point involved in this hearing,—the necessity for a viaduct at that point,—whether it be the present viaduct or a new viaduct is immaterial. I think that Mr. Burgis' testimony as to what efforts he made to have the present viaduct maintained is not strictly relevant, although it might tend to show the condition existing in the present viaduct, but when it is all said and done there is only one point at issue, so far as the Commission is concerned, and that is the question of the necessity for a viaduct at Newton Street.

Mr. McCaleb: Mr. Burgis, what advantage or disadvantages or benefit or non-benefit would the construction and maintenance of a viaduct at Newton street be to the M. L. & T. Railroad?

[fol. 154] Mr. Burgis: What advantage would it be?

Mr. McCaleb: Yes, of what benefit and advantage, if any, would it be to that railroad company?

Mr. Burgis: It would permit the operation of their trains without hindrance or without delay, with safety to their trains and safety to the general public.

Mr. McCaleb: What is the necessity for a viaduct at Newton street in Algiers?

Mr. Burgis: The necessity for a viaduct at Newton street lies in the fact that Newton street is the most direct highway from the central portion of Algiers to a large and important section of Algiers which is located below or east of the M. L. & T. tracks.

Mr. McCaleb: Mr. Burgis, did you make an examination of that viaduct, and will you kindly describe that viaduct and its condition to the Commissioner?

Commissioner Williams: Was that inspection made personally?

Mr. Burgis: Yes, sir.

Commissioner Williams: And any statement made here is a statement of conditions which you personally found to exist?

Mr. Burgis: Not of its conditions, but of what it consists of, the grades, the number of spans and the character of the structure generally. It described it in the language of an engineer.

Commissioner Williams: But not its condition?

Mr. Burgis: With one exception,—the steel work is described as being dangerous and defective in some of its parts.

[fol. 155] Commissioner Williams: Did I understand you to say that the city engineer had made a census or a check of the traffic over the Newton street viaduct?

Mr. Burgis: Yes, sir.

Mr. McCaleb: We will just offer in evidence the statements of Mr. Burgis in lieu of his making it verbally.

(The document so offered and identified was thereupon received in evidence and marked "Burgis Exhibit 9").

Mr. McCaleb: Mr. Burgis, do you know approximately what the population is of that portion of Algiers on the lower side of the Newton street viaduct?

Mr. Burgis: I cannot state it authoritatively; I can only give you the opinion which I have formed, and my opinion is that—

Mr. Chaffe: Oh, don't do that; that is a mere guess.

Commissioner Williams: Well, in arriving at the population of that section I don't know of any other way than to get the opinion of people who are conversant with that section. They don't take a census by blocks or wards or districts, but I think that Mr. Burgis, if he is familiar with that section down there, and he ought to be, can give his opinion of the number of people living in that section.

Mr. Chaffe: I object to it on the ground that it calls for the opinion of the witness on a matter on which he is not expert.

Commissioner Williams: The objection is overruled. He has a right to state the approximate population there and give his reasons for it.

[fol. 156] Mr. Burgis: I would estimate the population affected at less than 5,000. I am conversant with the territory for the reason that our electric light and power lines cover the more thickly populated parts of it.

Commissioner Williams: Can you state just what you base your opinion or estimate on,—your estimate?

Mr. Burgis: Purely on observation.

Commissioner Williams: On observation of the traffic over your lines?

Mr. Burgis: To some extent, though we have no definite record of the number of passengers moving over the viaduct except for the past few weeks since the viaduct has been closed.

Commissioner Williams: Have you visited that section often?

Mr. Burgis: Yes, quite often.

Mr. McCaleb: Is the street car traffic in that section large or small at the present time?

Mr. Burgis: It is small at this time.

Mr. McCaleb: Since the viaduct has been closed?

Mr. Burgis: Yes, smaller than every before.

Mr. Chaffe: Do you mean to say it was small before the viaduct was closed?

Mr. Burgis: It is small as compared with the traffic that existed two or three years ago.

Commissioner Williams: Why?

Mr. Burgis: Because of the lessening of activities at the Naval Station.

[fol. 157] Mr. Chaffe: You mentioned a population of 5,000, what territory is covered by that estimate?

Mr. Burgis: The portion of Orleans Parish on that side of the river below the Newton street viaduct.

Mr. Chaffe: When was this viaduct closed to street car traffic?

Mr. Burgis: September 17, 1922.

Mr. Chaffe: What is the name of the company operating the street car line over the Newton street viaduct?

Mr. Burgis: South New Orleans Light and Traction Company.

Mr. Chaffe: That is the company of which you are president?

Mr. Burgis: Yes, sir.

Mr. Chaffe: How long has that company been operating a street railway line over and on the Newton street viaduct?

Mr. Burgis: Since March 21, 1917, I think is the date. Yes, March 17, 1921.

Mr. Chaffe: Was there a previous company operating cars over that viaduct?

Mr. Burgis: Yes, sir.

Mr. Chaffe: What was its name?

Mr. Burgis: Algiers Railway and Lighting Company.

Mr. Chaffe: Was there a company so operating prior to that one?

Mr. Burgis: No.

Mr. Chaffe: The southern New Orleans Light and Traction Company is the successor in franchise title of the Algiers Railway and Lighting Company, is it not?

[fol. 158] Mr. Burgis: It is, yes, sir.

Mr. Chaffe: It acquired the franchise from the Algiers company, did it not?

Mr. Burgis: Not directly, but to all intents and purposes it did.

Mr. Chaffe: Why do you say not directly?

Mr. Burgis: It acquired them through an individual who bought the property and franchises at a special master's sale, and who then transferred them to the South New Orleans Light and Traction Company.

Mr. Chaffe: It was to the Algiers Railway and Lighting Company that a franchise was granted by the city to cross this viaduct, was it not?

Mr. Burgis: It was either granted to the Algiers Railway and Lighting Company or to one or more individuals who then transferred it to that company.

Mr. Chaffe: There is only one franchise, in other words, to cross that viaduct by street railway, and that is the franchise your company is now operating under?

Mr. Burgis: There is only one franchise covering the operations

of the railway company,—the street railway department, but that franchise is a modified franchise. The first franchise differs in some essential particulars from the franchise which was subsequently granted.

Mr. Chaffe: Did the present—

Commissioner Williams: I don't want to interrupt, but I don't [fol. 159] think that this testimony has a thing in the world to do with the question of the necessity for a viaduct over the tracks of the Southern Pacific Lines at Newton street. So far as this Commission is concerned we will not hear that testimony.

Mr. Chaffe: I will make up the record by asking the questions and you can then dispose of them.

Commissioner Williams: All right.

Mr. Chaffe: Under what franchise *does* your company now cross this viaduct at Newton street with its cars?

Commissioner Williams: The Commission holds that that question is irrelevant and immaterial to the issues here.

Mr. Chaffe: Is that franchise by ordinance of the city of New Orleans?

Commissioner Williams: I will not permit questions along that line. They are irrelevant to the point at issue, which is the necessity for the construction of a viaduct at Newton street in Algiers. That question is irrelevant.

Mr. Chaffe: That franchise imposes certain obligations on your company, does it not?

Commissioner Williams: That question is ruled out as irrelevant.

Mr. Chaffe: I offer in evidence and ask to be annexed to a bill of exceptions copies of the contracts and franchises under which the South New Orleans Light and Traction Company is operating its street cars over the Newton Street viaduct?

Commissioner Williams: I will not let them be filed here, but they can be attached to your bill of exceptions, of course.

[fol. 160] Mr. Chaffe: Yes, sir.

Mr. McCaleb: Include them all, Mr. Chaffe, because the last one does not obligate us to do so.

Witness excused.

[fol. 161] Mr. B. VALLAS was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: What is your occupation, Mr. Vallas?

Mr. Vallas: Principal assistant city engineer of the city of New Orleans.

Mr. Kohn: Have either you or the city engineer had occasion to make a check of the vehicular traffic over the Newton street viaduct in New Orleans or Algiers recently?

Mr. Vallas: The city engineer ordered it done some time during November, 1921.

Mr. Kohn: What does that check show, and what period did it cover?

Mr. Vallas: I presume it covered one day, from 7:00 a. m. to 7:00 p. m.

Mr. Kohn: What does the check show,—how many vehicles went over there?

Mr. Vallas: This traffic census divides the traffic into automobiles, street cars, trucks, single and double teams,—do you want the totals or the details?

Mr. Kohn: The details, if you please.

Mr. Vallas: The number of pedestrians over that viaduct that day was 783; street cars, 139; automobiles 232; trucks 257; single and double teams, 219.

Mr. Kohn: Did you make a comparison between the traffic over the Newton street viaduct with that in any other portion of the city?

[fol. 162] Mr. Vallas: On that same date there was a traffic count taken at Burgundy and Elysian Fields Avenue, covering the same period, of time. Pedestrians, however, were not taken. There are no pedestrians shown for that check and there are no street cars at that intersection. Automobiles 2726; trucks 1788; single and double teams 659.

Mr. Kohn: Burgundy is one of the or the only paved thoroughfare leading from, say, canal street, down toward the St. Bernard Parish line, is it not?

Mr. Vallas: It is the only continuous paved thoroughfare, yes, sir.

Commissioner Williams: It is the only paved thoroughfare to Elysian Fields street?

Mr. Vallas: Yes, sir.

Mr. Kohn: Therefore the traffic would be much heavier at that point than at the Newton street viaduct?

Mr. Vallas: I would think so.

Mr. Kohn: Did the city engineer ever make an estimate of the cost of repairing the Newton street viaduct?

Mr. Vallas: He made an estimate of the cost of repairing this viaduct, yes, sir. I have the revised estimate of the cost of repairs to Newton street viaduct.

Commissioner Williams: Suppose you offer in evidence a certified copy of the estimate made jointly by the city engineer and the engineer for the M. L. & T. That is what that seems to me. You can send it to the Secretary at Baton Rouge and it will be filed.

[fol. 163] Mr. Kohn: We will reserve the right to do that.

Commissioner Williams: That will be the best way to handle it.

Witness excused.

[fol. 164] Mr. J. BODENGER was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Mr. Bodenger, where do you reside?

Mr. Bodenger: 175 Delarode street, Algiers.

Mr. Kohn: Is that about the Southern Pacific plant or below it?

Mr. Bodenger: It is right near the Canal Street ferry,—about the Southern Pacific.

Mr. Kohn: Are you interested in any way in real estate over there?

Mr. Bodenger: Pretty extensively, yes, sir.

Mr. Kohn: Where is some of your land situated that you recently developed, if any?

Mr. Bodenger: On both sides of the Southern Pacific tracks.

Mr. Kohn: How far are you holdings from the Southern Pacific tracks?

Mr. Bodenger: About five or six squares. I have a map which will give you the exact lines. Here is a tract I have just opened. I have this Boulevard tract here.

Mr. Kohn: How much money have you expended on the Boulevard tracts?

Mr. Bodenger: I have sold in these squares over \$100,000 worth.

Mr. Kohn: You have developed over \$100,000 worth of holdings on the west side of the railroad tracks?

Mr. Bodenger: Yes, sir.

Mr. Kohn: You have holdings on either side of the property of the Southern Pacific?

[fol. 165] Mr. Bodenger: Not directly opposite, but it is scattered all over that section.

Commissioner Williams: Served by this viaduct?

Mr. Bodenger: Yes, sir.

Mr. Kohn: Are there any buildings back of the Oakdale subdivision?

Mr. Bodenger: I should judge about 250,—they are rather small but they are homes of people just the same.

Mr. Kohn: How do those people have to come to get to the Canal street ferry?

Mr. Bodenger: Like it is now, they have to go over the Patterson street ferry, but otherwise they go on the Newton street ferry.

Mr. Kohn: Within your knowledge, Mr. Bodenger, before this viaduct was built what was the condition of all the land down in there?

Mr. Bodenger: Why, there was nothing there at all.

Mr. Kohn: What has been the direct cause, in your opinion or in your knowledge, of the development that has taken place below the viaduct?

Mr. Bodenger: Positively that Newton street viaduct build up that section of the country.

Mr. Kohn: Would people build down in there without a convenient outlet?

Mr. Bodenger: I stopped my development on account of that. It isn't only the Canal Street ferry people go to, but to Gretna and all up in there, and it interferes with them also.

[fol. 166] Mr. Kohn: Now, is there any available land on the west side of the M. L. & T. tracks up as far as Lamarque street, suitable for development, on the west side?

Mr. Bodenger: It must cross the track to develop. There is plenty

of land down in there, but not on this side. That is where Algiers will have to develop.

Mr. Chaffe: If the Newton street viaduct had been kept in a good state of repair and was in good state of repair today there wouldn't be any difficulty in getting across the tracks at that point, would there?

Mr. Bodenger: Certainly not, if it was kept up.

Witness excused.

[fol. 167] Mr. A. SPITZFADDEN, Jr., was called as a witness, and, having been duly sworn, testified as follows:

Mr. Kohn: Mr. Spitzfadden, where do you live?

Mr. Spitzfadden: 518 Pelican Avenue.

Mr. Kohn: Is that above or below the M. L. & T. holdings?

Mr. Spitzfadden: It is above.

Mr. Kohn: What is your business or occupation?

Mr. Spitzfadden: I am president of the Algiers Trust and Savings Bank.

Mr. Kohn: In that capacity do you have occasion to pass upon land values in making loans and are you familiar with the relative values of property in Algiers, both above and below the Newton Street viaduct?

Mr. Spitzfadden: Yes, reasonably so.

Mr. Kohn: Do you remember the condition of the land, say, some where around or prior to 1907, in that section below the M. L. & T. holdings.

Mr. Spitzfadden: Well, that land, to my recollection, was very sparsely settled. You refer to the tract from the M. L. & T., say, to the end of the Naval Station?

Mr. Kohn: Yes, sir, along Newton Street.

Mr. Spitzfadden: It was very sparsely settled.

Mr. Kohn: What is the condition of those properties now?

Mr. Spitzfadden: Well, that section has made wonderful strides. Land values down there, I should say, have trebled in the past ten years, in some parts of it. In fact, in most of that part of Algiers [fol. 168] land values have trebled in the past ten years.

Mr. Kohn: If there was no way of getting through *by* viaduct or otherwise, say at about Newton street, and you were called upon in your capacity of a bank official to advance a loan on property down there, would you say that that would have any bearing on what amount you would loan or whether you would make the loan at all.—the fact of the viaduct being or not being there?

Mr. Spitzfadden: I would not value the land as highly without the viaduct, by any means.

Mr. Kohn: In your opinion would or would not a grade crossing at Newton street, considering the character and amount of traffic there, be a dangerous condition?

Mr. Spitzfadden: Personally I would oppose it from the standpoint of danger to pedestrians and vehicular traffic and from the standpoint of the inconvenience to the railroad in the operation of

its trains. I do not think it would be a good business move on the part of the railroad to have an open grade crossing there.

Mr. Chaffe: If the Newton street viaduct had been kept in repair and was in repair today there would be no necessity for another viaduct, would there?

Mr. Spitzfadden: Well, I believe that the Patterson street viaduct should be maintained likewise.

Mr. Chaffe: Of course, I include that, but Patterson street and Newton street viaduct would be sufficient, would they not?

Mr. Spitzfadden: In so far as the viaducts are concerned, personally I believe if we had another opening, say a half or three quarters of a mile above the present viaduct at Newton street it would avoid this same complication in the next ten or fifteen years.

Mr. Chaffe: But there is no necessity now for any such structure, is there?

Mr. Spitzfadden: Well, in a way there is, yes. I mean along the Southern Pacific tracks toward Gretna,—there should be one at some one of those streets in there. I mean on the upper section where there are only three or four tracks.

Mr. Chaffe: Have you been out there recently?

Mr. Spitzfadden: Not in the past six months,—I believe the last time I was out in that section was four or five months ago.

Mr. Chaffe: But there is no immediate necessity for anything like that?

Mr. Spitzfadden: Well, there is in this respect; if you open one of those streets now you will avoid just such a question as we have now in the next few years.

Mr. Chaffe: In other words, there is no reason, at the point you refer to why there should not be a street opened up, is there?

Mr. Spitzfadden: There should be another opening higher up because of the number of people who live on the other side of the railroad and moving in there as that land is being drained.

Mr. Chaffe: Do you think it will help develop it?

Mr. Spitzfadden: It will help those who are already there.

Witness excused.

[fol. 170] Commissioner Williams: Mr. Chaffe: who is this witness who is sick and whose testimony you want,—what is his position?

Mr. Chaffe: He is superintendent of these structures.

Commissioner Williams: Well, we will continue this case to Friday, October 13, to hear his testimony.

(Whereupon, at 4:05 p. m., October 4, 1922, the hearing in the above numbered and entitled matter was continued to October 13, 1922).

[fol. 171] New Orleans, Louisiana, October 13, 1922—10.15 a. m.

Proceedings

(Pursuant to adjournment on October 4, 1922, the hearing in the above numbered and entitled matter was this day resumed be-

fore Commissioner Williams, with the same appearances as previously noted).

Commissioner Williams: In this matter Mr. Chaffe representing the Morgan's Louisiana and Texas Railroad and Steamship Company has asked for a continuance; and the case will therefore be continued to Friday, October 20, at 10:00 o'clock. The reason for granting this continuance is that conferences have been held and very probably will be held looking to an adjustment of this complaint which promise speedy reconstruction and repair of the Newton street viaduct. Indications at this time point to quick relief in the Newton street viaduct troubles in Algiers; and as this Commission is interested chiefly in results I feel that under the circumstances this delay can properly be granted. The case is continued to October 20.

(Whereupon, at 10:20 a. m., October 13, 1922, the hearing in the above numbered and entitled matter was continued to October 20, 1922, at 10:00 a. m.).

[fol.172] New Orleans, Louisiana, November 3, 1922—10.00 a. m.

Proceedings

(Pursuant to adjournment on October 13, 1922, the hearing in the above numbered and entitled matter was this day resumed before Commissioner Williams, with the same appearances as previously noted.)

Commissioner Williams: We will proceed with the case, gentlemen.

Mr. Chaffe: Mr. Commissioner, you have no doubt seen in the newspapers that Commissioner Maloney of the Commission Council of the City of New Orleans has rendered a report to the Commission Council with reference to the repairs on the Newton street viaduct. That report, as I understand it, has been referred back to him for further action on his part. I suggest, therefore, with the consent of counsel representing the complainants in this case, that this matter be continued to *to* be re-fixed for hearing at some future date, because if anything comes of the report of Commissioner Maloney then there will be no necessity for any further action on the part of the Commission. I have communicated with Mr. Norman and Mr. Kohn and I understand they are agreeable to this course.

Mr. Norman: We are not agreeable to the indefinite continuance of it, Mr. Commissioner.

Commissioner Williams: We might as well get our position clear on this matter right now. Our position is this: we are going to continue [fol.173] to hear testimony and to close this case today, if possible. It is my plan and my belief that the Commission should have this case closed before it, because the Commission as a whole, after it has considered this matter, may not be willing to approve of the character of settlement which may be proposed in the matter. I do not state that this is the fact, but it is certainly a contingency

that may arise; and for that reason I want this record made up and closed on this proceeding brought before the Commission. There may be questions in this matter that are fundamental and that are possibly more important and far-reaching than the mere repair of a viaduct in Algiers, important as that subject is. For that reason we want this record completed before this Commission so that it may be given consideration. It may be the judgment of the Commission that a continued inconvenience to the people of Algiers is preferable to a surrender of what the Commission believes to be its jurisdiction. We believe it is essential that the matter of jurisdiction be settled once and for all in order that there may continue to be a proper functioning of the Public Service Commission. I think it is best that we should go ahead and get this evidence in today if possible and close the record, because such action will not interfere with any negotiations now pending. Then, too, we have no jurisdiction over the city of New Orleans and we have none over the Algiers street railway company. Therefore, the Commission would be in no position to enforce any agreement that might be entered into between three parties, two of whom we have no jurisdiction over. As I said before, the Commission is entitled to consider this case in its entirety, for it may be, as I have already said, that it would not be willing to approve the adjustment of this complaint suggested by Commissioner Maloney. I do not, of course, assume to say that the Commission would not approve such an adjustment; but I say that possibly they would not; and for that reason the Commission is entitled to have a full and complete record of this matter and the case closed before it. I realize that this viaduct question is an important one and no one is more anxious than I am to afford the quickest and speediest relief possible; but, speaking for myself, I am not willing that this should be secured at the absolute surrender of a greater principle,—the right of the Commission to hold jurisdiction in such matters as this. It is possible that questions have arisen here which are more fundamental and important to the people of the city of New Orleans and Algiers, and the state as a whole, for that matter, than even a continuance for the time being of this inconvenience to the people of Algiers, and I feel quite sure that they would agree with me in that position. There are times when it is necessary for individuals and communities to suffer some inconvenience in order that greater questions may be properly determined; and for that reason we will go ahead and hear this case and bring it to a conclusion.

Mr. Kohn: We feel this way about it, Mr. Commissioner: we have no personal feeling in this matter other than that we want the inconvenience that we are suffering over there done away with. Now, [fol. 175] at the hearing this morning Mr. Chaffe is somewhat handicapped by not having his witnesses present, thinking that this matter would be continued until the negotiations now pending were concluded one way or another. For that reason I am willing to acquiesce in a continuance of this matter for a reasonable time, but we are not willing to an indefinite continuance. We are perfectly willing to give Mr. Chaffe an opportunity to get his witnesses here, but we are not willing to continue it indefinitely.

Commissioner Williams: If Mr. Chaffe has not got his witnesses here and it is agreeable to the complainants, I, of course, am willing that he should have time to produce his witnesses. I don't know just what Mr. Chaffe wants to prove by his witnesses because it seems to me that the question of the necessity of repairing this viaduct at Newton street is almost admitted. The only question at issue is the question of the legal right of this Commission to compel the Southern Pacific to provide such a structure. It seems to me that Mr. Chaffe's objection is one of law rather than one of fact.

Mr. Chaffe: I want the whole history of the viaduct in the record, Mr. Commissioner. I have no witnesses that I can produce today.

Commissioner Williams: Well, we have got to know where we stand in this matter. We are going to complete this record. We will continue this case until Monday morning, November 6, and at that [fol. 176] time we are going to take it up and complete it and close this record as far as this Commission is concerned. The case is continued until Monday morning, November 6, at 11:00 o'clock.

(Whereupon, at 10:25 a. m., November 3, 1922, the hearing in the above numbered and entitled matter was continued to 11:00 a. m., November 6, 1922.)

[fol. 177] New Orleans, Louisiana, November 6, 1922—11.00 a. m.

Proceedings

(Pursuant to adjournment on November 3, 1922, the hearing in the above numbered and entitled matter was this day resumed before Commissioner Williams, with the same appearances as previously noted.)

Commissioner Williams: We will proceed with this case, gentlemen, and go through until we finish it. Now, if there is any further testimony that the complainants want to offer we will go ahead and take that, before the testimony of the M. L. & T. is put in.

Mr. Norman: We just have a couple of photographs that we want to put in, Mr. Commissioner, before Mr. Chaffe starts.

Commissioner Williams: Go ahead.

Mr. Norman: We will recall Mr. Burgis.

Mr. E. W. BURGIS was recalled for further examination, and, having been previously sworn, testified as follows:

Mr. Norman: Mr. Burgis, will you examine this panoramic picture and state what is shown thereon?

Mr. Burgis: This is a photograph taken from the top of the Newton street viaduct, looking in a westerly direction. It shows, among other things, the public water purification plant, and in the fore-[fol. 178] ground, the houses and stores, etc., on the upper side of the viaduct,—views taken looking directly along Newton street in the direction of the river.

Mr. Norman: We will offer the photograph in evidence.

(The document, so offered and identified, was thereupon received in evidence, and marked "Burgis' Exhibit 3").

Commissioner Williams: This is looking toward the more thickly settled portion of Algiers?

Mr. Burgis: Yes, sir, what is known as Algiers proper.

Mr. Norman: Now, Mr. Burgis, I show you another panoramic photograph and I ask you to examine it and state what it is?

Mr. Burgis: This is a photograph taken from a point on top of the Newton street viaduct looking in an easterly direction. The view immediately in front is that of Newton street and on down General Meyer Avenue beyond Newton street.

Commissioner Williams: General Meyer Avenue is a continuation, as a matter of fact, of Newton street?

Mr. Burgis: Yes, sir; this view shows, in particular, the United States Naval Station and the buildings in that station; and residences and stores and other buildings in the foreground and in the distance. It also shows the public drainage plant and the oil station of the Southern Pacific Railroad in the distance on the right.

Mr. Norman: We will offer the evidence in evidence in connection with the testimony of Mr. Burgis.

[fol. 179] (The document so offered and identified was thereupon received in evidence and marked "Burgis' Exhibit 4").

Mr. Norman: Mr. Burgis, I show you a tabulation of distances between several places in Algiers and the corner of Newton Street and Behrman Avenue, as measured via the Newton street viaduct route and as measured by the Patterson street viaduct route; and I ask you whether or not these distances were tabulated by you, and, if so, from what sources the information was derived?

Mr. Burgis: I made this tabulation of distances by careful scaling of an official city map of New Orleans to determine the comparative distances from the one starting point at the corner of Newton street and Behrman Avenue to sundry places of public interest on the upper side of Algiers, the starting point at Newton street and Behrman Avenue being on the lower side of the viaduct, and the approximate center of activity on that side of the viaduct, the intention being to arrive at an intelligent understanding of the comparative distances that a person would have to travel from that starting point to these various points of general interest.

Mr. Norman: We will offer the tabulation in evidence.

Mr. Chaffe: I object to the offering unless in connection with it the official map of the city referred to by the witness is used, as otherwise there will be no opportunity to check it up.

Commissioner Williams: First of all, Mr. Burgis, to get the record straight, do you swear to the accuracy of these figures?

[fol. 180] Mr. Burgis: Yes, sir, so far as they can be carefully scaled from an official map; and I believe further that a chaining of the routes would positively verify these distances.

Commissioner Williams: You swear to the distances which you have figured out here?

Mr. Burgis: Yes, sir, and I would like to state in connection with that that I selected the shortest routes in each instance, irrespective of the passability of the streets or of the condition of the streets over which the distances were computed. The shortest routes have been used in each instance, by way of public streets, of course.

Commissioner Williams: Well, in so far as the witness swears to the correctness of these distances the Commission will rule that this table of distances is admissible.

Mr. Chaffe: In addition to the foregoing objection I object to the introduction of the document without the map on which it is based for the reason that the witness states that the shortest distances were used. Now, there may be a question of opinion as to what routes were taken and as to whether the route taken in making the measurement was the shortest route. The document itself does not show the route taken by the witness in making his measurements.

Commissioner Williams: Mr. Chaffe, the table of distances shows from Newton street and Behrman Avenue to certain buildings or places. Mr. Burgis has testified that his figures on these particular movements from Newton street and Behrman Avenue to these places [fol. 181] is correct, or that the distances which he shows are correct; and to that extent the offering is admissible. Now, you have a right to look at this and you can offer testimony to show that from Newton street and Behrman Avenue to these particular places that the distances which he shows are incorrect.

Mr. Chaffe: Then I ask that the opportunity be afforded us to take the map referred to by the witness and check the measurements to ascertain whether they are the shortest distances between the various points.

Commissioner Williams: You are entitled to that. Mr. Norman, can't you get a copy of that map from the City Engineer's Office?

Mr. Norman: In connection with the testimony of the witness we offer in evidence a copy of the map of the city of New Orleans as used by this witness in this compilation and we ask leave to file same later.

Commissioner Williams: Permission is granted to file it later, but it will have to be filed before this hearing is closed today.

Mr. Chaffe: Then we desire an opportunity to cross examine the witness with the map in front of us to ascertain what routes were taken by him in computing these distances.

Mr. Norman: I will go up stairs now and see if we can get one.

(A recess of 10 minutes was taken to enable the map to be procured).

Mr. Norman: Mr. Commissioner, we have secured a copy of the map, and Mr. Oliveria, the Assistant City Engineer, has come up to assist us.

[fol. 182] Commissioner Williams: All right.

Mr. Norman: We will have Mr. Burgis testify as to the route he used and then have Mr. Oliveria scale the distance on the map. I think it will save time, if it is agreeable to everybody.

Mr. Chaffe: That is all right.

Mr. B. J. OLIVERIA was called as a witness, and, having been duly sworn, testified as follows:

Commissioner Williams: What is your official position, Mr. Oliveria?

Mr. Oliveria: Assistant City Engineer.

Mr. Norman: Mr. Oliveria, we have before us an official city map of the city of New Orleans. Now, as Mr. Burgis gives us the route that he used in making certain compilations of distances will you be good enough to scale those distances on the map and give us such distances in feet?

Mr. Oliveria: Yes, sir.

Mr. Norman: Now, Mr. Burgis, what route did you take,—please look at this map,—what route did you take in going of ascertaining the distance from Newton street and Behrman Avenue to the Canal Street ferry landing in Algiers, via the Newton street route? Please mark that point with an "A." That "A" is marked where?

Mr. Burgis: Newton street and Behrman Avenue. The route used is along Newton street to the corner of Newton street and Verret; thence along Verret street to Opelousas; thence along Seguin street [fol. 183] to Morgan; and then along Morgan street to the Canal Street ferry landing.

Mr. Norman: Will you please give us that distance, Mr. Oliveria?

Mr. Oliveria: 8,075 feet.

Mr. Chaffe: I will call attention to the Commission to the fact that the distance as indicated on this exhibit is 7,890 feet.

Mr. Chaffe: Now, give us, please, Mr. Burgis, the route you took from Newton and Behrman streets to the Canal Street ferry landing via Patterson street viaduct.

Mr. Burgis: Starting from the same point; thence along Behrman Avenue to Patterson street and following Patterson street to Morgan, and following Morgan to the ferry landing.

Mr. Norman: Will you please give us that distance, Mr. Oliveria?

Mr. Oliveria: 9,440.

Mr. Chaffe: What route, Mr. Burgis, did you take from Newton and Behrman streets to the court house?

Mr. Burgis: Starting at the same point, then along Newton street, —I am giving you the Newton street viaduct route now,—

Mr. Chaffe: Yes, that is what I want; the Newton street route.

Mr. Burgis: Along Newton street to Verret; along Verret to Opelousas; along Seguin to Morgan and along Morgan to the court house.

Mr. Chaffe: Indicate on the map where the court house is, please. Indicate it with the letter "C."

(The witness does so.)

[fol. 184] Mr. Chaffe: Now, what is that distance, Mr. Oliveria?

Mr. Oliveria: 7,950 feet.

Mr. Chaffe: What route did you use, Mr. Burgis, in figuring the distance via Patterson street?

Mr. Burgis: From Newton and Behrman streets along Behrman street to Patterson street, along Patterson to Morgan and along Morgan to the same point.

Mr. Chaffe: What is the distance, Mr. Oliveria?

Mr. Oliveria: 8,700 feet.

Mr. Chaffe: 8,700 feet.

Mr. Oliveria: Yes, sir, that is correct.

Mr. Chaffe: Now, Mr. Burgis, what route did you take in getting from Newton street and Behrman Avenue, via the Newton street viaduct, to the postoffice,—first; on what street or between what streets is the postoffice?

Mr. Burgis: It is on Pelican Avenue, between Verret and Olivia.

Mr. Chaffe: Mark it with a "P," please.

Mr. Burgis: All right; now, you want the Newton street route?

Mr. Chaffe: Yes, sir.

Mr. Burgis: Along Newton street to Verret; along Verret to Pelican and along Pelican to the postoffice.

Mr. Chaffe: Now, the distance, please, Mr. Oliveria?

Mr. Oliveria: 7,250.

Mr. Chaffe: Now, Mr. Burgis, will you give us the route via Patterson street?

[fol. 185] Mr. Burgis: From Newton and Behrman; along Behrman to Patterson along Patterson to Elmira; along Elmira to Pelican and then along Pelican to the postoffice.

Mr. Chaffe: Please scale the distance, Mr. Oliveria?

Mr. Oliveria: 8,085 feet.

Mr. Chaffe: Now, take it from Newton and Behrman, Mr. Burgis, via the Newton street viaduct, to the Catholic church?

Mr. Burgis: The Catholic Church is located on Verrett street, between Alex and Eliza streets, and nearer to Alex. From Newton and Behrman, along Newton street to Verret; along Verrett to the church. Shall I designate the church on the map?

Mr. Chaffe: Yes, mark it with a "G".

Mr. Burgis: I have done so.

Mr. Chaffe: Now, scale it, Mr. Oliveria?

Mr. Oliveria: 6,500 feet.

Mr. Chaffe: Now give us the Patterson street route, Mr. Burgis.

Mr. Burgis: From Newton and Behrman; thence along Behrman to Patterson; Patterson to Elmira; Elmira to Alex; Alex to Verret and Verret to the church.

Mr. Chaffe: Please scale it, Mr. Oliveria.

Mr. Oliveria: 8,425 feet.

Mr. Chaffe: Now, Mr. Burgis, you similarly laid out and scaled each one of the routes? You personally did this, did you not.—as to each one of the routes shown in this document marked "Table of Distances".

[fol. 186] Mr. Burgis: I scaled it in the same manner that Mr. Oliveria did, yes, sir, but I think perhaps a little more carefully than Mr. Oliveria has had an opportunity of doing at this time.

Mr. Chaffe: And you personally attended to having these photographs taken?

Mr. Burgis: Yes, sir.

Mr. Chaffe: Your counsel, or counsel for the South New Orleans

Light and Traction Company, of which you are president, Mr. E. H. McCaleb, is now present at this hearing, is he not?

Mr. Burgis: Yes, sir.

Mr. Chaffe: And he has been present at each and every hearing that has been held in this matter, and present all of the time, has he not?

Mr. Burgis: Yes, sir.

Mr. Chaffe: Though the South New Orleans Light and Traction Company is not technically a party to this proceeding?

Mr. Burgis: Yes, sir.

Mr. Chaffe: In connection with the testimony of the witness we offer the map to which reference has been had during the course of this testimony, and I ask that it be marked "Morgan Company Exhibit '1-A'"; and I ask that this map be taken in lieu of the first map that we originally offered. We offered a city map, to be filed, and we will now just file this to cover the previous offer.

Commissioner Williams: That is all right.

[fol. 187] (The document so offered and identified was thereupon received in evidence and marked "Morgan Company's Exhibit 1-A").

Mr. Norman: On this map it doesn't show between which streets the respective viaducts are located?

Mr. Chaffe: Yes, sir, it shows the Newton street viaduct.

Mr. Norman: It shows Newton street but not the viaduct.

Commissioner Williams: Then you had better indicate on that map the beginning and ending of both the Newton street and Patterson street viaducts. Can you do that, Mr. Oliveria?

Mr. Norman: Mr. Burgis is more familiar with the territory and I expect we had better have him do it.

Commissioner Williams: All right; just so it is shown on the map.

Mr. Norman: Mr. Burgis, please indicate on this map—

Commissioner Williams: Ask him the question and get it in the record,—ask him on what streets they begin and end?

Mr. Norman: Mr. Burgis, on what street is the Newton street viaduct located?

Mr. Burgis: On Newton street.

Mr. Norman: And between what cross streets?

Mr. Burgis: On the west side it starts at Elmira Avenue and terminates on the east side at Whitney Avenue.

Mr. Norman: Will you indicate the location of this viaduct on this map by pencil marks?

Mr. Burgis: Yes, sir, I have shaded it with pencil lines.

[fol. 188] Mr. Norman: Now, on what street is the Patterson street viaduct located?

Mr. Burgis: On Patterson street.

Mr. Norman: And between what cross streets?

Mr. Burgis: It starts on the west side at Elmira Avenue. Now, I do not remember at what street it terminates on the east side.

Mr. Chaffe: I understand it is about Whitney Avenue.

Commissioner Williams: In crossing over the Patterson street

viaduct, going toward the lower part of Algiers, what would be the first cross street you would reach?

Mr. Burgis: That is what I would like to know; I think it is Whitney Avenue, but I am not absolutely positive of that. I think I have a map here that indicates that, but I would not be even positive about the map because it is only shown on there roughly. I know for a fact that it starts at Elmira on the west and I am not sure at what street it terminates on the east. I am sorry I have not the information.

Commissioner Williams: Can't you get that information in the City Engineer's office, Mr. Oliveria? They ought to know up there the exact location of it?

Mr. Oliveria: No, sir, we haven't it located on any map in our office, but probably some of the people in the office who have done work over there would know. I will go up and find out.

Mr. Burgis: My impression is it stops one block short of Whitney Avenue.

[fol. 189] Commissioner Williams: Well, we can get that information later on and put it in the record. We know approximately where it ends, anyway. Let's go ahead with the case.

Mr. Norman: That closes the case for the complainants, Mr. Commissioner.

Witnesses excused.

[fol. 190] Mr. Chaffe: We offer in evidence the opinion of the City Attorney given to the Commission Council last spring to the effect that the South New Orleans Light and Traction Company is legally obligated to keep the Newton street viaduct in repair and to repair the same at the present time, and I ask leave to substitute a certified copy in lieu of the original?

Mr. Norman: We object to that offering in behalf of the petitioners on the ground that the sole question before the Commission is as to whether or not there is necessity for a viaduct at Newton street, and, if so, whether or not the Commission has a legal right and authority to order or compel the Morgan's Louisiana and Texas Railroad and Steamship Company to repair and maintain the same. Any opinion that the City Attorney may have given on the subject is wholly irrelevant and immaterial.

Commissioner Williams: The objection is sustained because this Commission has taken the position from the beginning of these hearings that those matters affecting the South New Orleans Light and Traction Company and the City of New Orleans are irrelevant to this proceeding. The objection is sustained.

Mr. Chaffe: I reserve my exception to the ruling.

It is admitted by counsel for all parties that the Patterson street viaduct terminates at about 50 feet above Whitney Avenue on the east side and begins at Elmira street on the west side.

[fol. 191] Mr. P. B. TORIAN was called as a witness, and, having been duly sworn, testified as follows:

Mr. Chaffe: Mr. Torian, what is your official connection with the M. L. & T. R. R. & S. S. Co.?

Mr. Torian: Superintendent of the New Orleans terminals.

Mr. Chaffe: Does that include, so far as operation is concerned, the tracks in the Algiers yard?

Mr. Torian: Yes, sir.

Mr. Chaffe: Though you are not in charge of the shops themselves?

Mr. Torian: No, sir.

Mr. Chaffe: Mr. Oelkers is in charge of the shops?

Mr. Torian: Yes, sir.

Mr. Chaffe: Does the Patterson street viaduct come within your jurisdiction?

Mr. Torian: Yes, sir.

Mr. Chaffe: Mr. Torian, there has been a great deal of testimony here as to the condition of the Patterson street viaduct. Will you please tell us what is its condition?

Mr. Torian: The Patterson street viaduct is in very good condition.

Mr. Chaffe: The statement has been made that part of the decking is not covered, or that part of the decking is not covered with planks. What are the facts with reference to that?

Mr. Torian: All of the decking,—all of the structure is covered [fol. 192] with planks. There are two layers of plank over the structure; the top layer is about 2½ feet from each side, but it is protected,—about 2-1½ feet from the end of the viaduct, but it is protected by the lower decking.

Commissioner Williams: When you say the end you mean the ends?

Mr. Torian: Yes, this is in the center.

Mr. Chaffe: Is that 2-1½ feet of space on the outside of the top decking uncovered or covered, and if covered how is it covered?

Mr. Torian: No, sir, it is covered.

Mr. Chaffe: With what?

Mr. Torian: With planks.

Mr. Chaffe: How thick?

Mr. Torian: Three inch.

Mr. Chaffe: In what condition is that?

Mr. Torian: Good condition.

Mr. Chaffe: Mr. Torian, have you ever complained to the city of New Orleans and to the South New Orleans Light and Traction Company about the condition of the Newton street viaduct, and, if so, for how long, and what was done, if anything?

Mr. Torian: I have taken it up with both the city of New Orleans and the South New Orleans Traction Company for the past six years, with reference to the condition of the Newton street viaduct.

Mr. Chaffe: When you say you have taken it up just what do you mean?

[fol. 193] Mr. Torian: Both by letter and in person.

Mr. Chaffe: But what did you do or say?

Mr. Torian: I called their attention to the depreciation of this structure from the want of paint.

Mr. Chaffe: Now, had this Newton street viaduct been kept painted, would it, in your opinion, have——

Mr. McCaleb: We object to that on the ground that this witness has not been shown to be an expert.

Commissioner Williams: Mr. Torian, you can testify as to the condition of this viaduct as you saw it, but you cannot testify as an expert on viaducts or bridges until you have been so qualified. You can say what you saw. You can say that the bridge was in bad shape or that it was not in bad shape, or that it had a hole in it, or something like that, but you cannot testify as to the cause of these things unless you qualify as an expert.

Mr. Torian: May I ask a question?

Commissioner Williams: Certainly.

Mr. Torian: Well, we have a viaduct that is 11 years older——

Mr. Chaffe: I will bring that out, Mr. Torian. How long have you been superintendent of terminals here in New Orleans for the Morgan Railroad?

Mr. Torian: 7 years.

Mr. Chaffe: During that 7 years has your jurisdiction included the care and maintenance of any steel structures?

[fol. 194] Mr. Torian: Yes, sir, all of our steel structures.

Mr. Chaffe: All such structures here in the New Orleans terminal are within your jurisdiction?

Mr. Torian: Yes, sir.

Mr. Chaffe: Have you had any experience in the care and maintenance of such steel structures?

Mr. Torian: Yes, sir.

Mr. Chaffe: Covering what period?

Mr. Torian: Well, I have been actively in charge for 7 years.

Mr. Chaffe: Why do you say "actively"?

Mr. Torian: Because I have been connected with this railroad for 20 years.

Mr. Chaffe: And——

Mr. Torian: I have been handling steel structures during that whole time.

Mr. Chaffe: During that long stretch of years has it been part of your duty to see that such structures were properly cared for and maintained?

Mr. Torian: Yes, sir.

Mr. Chaffe: I submit that he has qualified as an expert on the maintenance of steel structures?

Mr. McCaleb: I think so myself.

Commissioner Williams: I think that can be admitted, but as a matter of fact I don't think it makes any difference because I think everybody is agreed that had the Newton street viaduct been kept [fol. 195] up that it would not be in the condition it is at this time. Of course, it might have gotten in bad condition in time to come.

but,—well, let him go ahead and testify. I don't think it is important in this case, however.

Mr. Chaffe: Mr Torian, has the Morgan Company any structure of the same type in the vicinity of the Newton street viaduct?

Mr. Torian: Yes, sir, the Patterson street viaduct.

Mr. Chaffe: How long has it been up?

Mr. Torian: 26 years.

Mr. Chaffe: What has been done toward the maintenance of the structure itself, not taking into account the decking,— during that time?

Mr. Torian: It has been scaled and painted about every two years.

Mr. Chaffe: What is its condition in so far as,—well, what is its condition today,—the Patterson street viaduct?

Mr. Torian: It is in good condition.

Mr. Chaffe: Are any of its members showing signs of giving away?

Mr. Torian: No, sir.

Mr. Chaffe: What, if any, difference exists between the exposure to the atmosphere and elements and gasses from locomotives to which the Patterson street viaduct is subjected and has been subjected since it has been built and that to which the Newton street viaduct is and has been exposed since it was built?

[fol. 196] Mr. Torian: Practically the same exposure, except that the Patterson street viaduct has more engines passing under it than the Newton street viaduct has.

Mr. Chaffe: And for that reason has been subjected to a greater amount of gas from locomotives than the Newton street structure has?

Mr. Torian: Yes, sir, on account of the passage of more locomotives under it.

Mr. Chaffe: During the time you have been superintendent of terminals has the city ever painted the Newton street viaduct?

Mr. Torian: Yes, sir.

Mr. Chaffe: About how long ago?

Mr. Torian: About 4 years ago.

Mr. Chaffe: Now, I ask you if the Newton street viaduct had been kept painted, as the Patterson street viaduct has been kept painted, what, in your opinion, would be its condition today?

Mr. Torian: It would be in good condition.

Mr. Chaffe: What, in your opinion, is the present condition of the Newton street viaduct?

Mr. Torian: Its present condition is a dangerous condition.

Mr. Chaffe: During the life of the Patterson street viaduct, and up to the present time,—how long did you say that was?

Mr. Torian: The Patterson street viaduct is 26 years old.

Mr. Chaffe: During that 26 years have there been any repairs or renewals to the steel structure itself?

[fol. 197] Mr. Torian: No, sir.

Mr. Chaffe: The only repair or renewal to which the steel struc-

ture itself, then, has been subjected, as I understand it, is that it has been kept painted and scraped?

Mr. Torian: Yes, sir.

Mr. Chaffe: And that has been done about every two years?

Mr. Torian: Yes, sir.

Mr. Chaffe: And had the same thing been done to the Newton street viaduct in your opinion it would be in just as good condition today as the Patterson street viaduct is?

Mr. Torian: Yes, sir.

Commissioner Williams: Mr. Torian, how does the steel structure of the Patterson street viaduct compare with the steel structure of the Newton street viaduct? Is it a better type of construction or not as good a type of construction as the Newton street viaduct? In other words, is the steel work in the Patterson street viaduct better steel work than the steel work in the Newton street viaduct?

Mr. Torian: I believe they are of the same.

Commissioner Williams: The same type?

Mr. Torian: Well, not the same type, but the same metal.

Commissioner Williams: In other words, you mean they are both steel structures?

Mr. Torian: Yes, sir.

Commissioner Williams: Now, as to the steel beams and the steel [fol. 198] posts in these two structures, are they—

Mr. Torian: They are practically the same, except that one has lattice posts and the other has solid posts.

Mr. Chaffe: One of the witnesses here has testified to some defects in the decking of the Patterson street viaduct.—I think Mr. Norman was the witness. Will you please state whether or not you have ever discussed with Mr. Norman the Patterson street viaduct?

Mr. Torian: Yes, sir, I asked Mr. Norman, as a favor to me, that any time he ever noticed anything wrong with the Patterson street viaduct to please stop at the office of the supervisor of bridges and buildings, which is right at the foot of the viaduct, and call his attention to it and he would immediately repair it, as he is in direct charge of it.

Mr. Chaffe: Who is the supervisor of bridges and buildings?

Mr. Torian: Mr. Legendre.

Mr. Chaffe: Has Mr. Norman or anyone else ever complained to you about the condition of the decking of the Patterson street viaduct?

Mr. Torian: No, sir.

Mr. Chaffe: In so far as you are aware has Mr. Norman ever made any complaint to the supervisor of bridges and buildings concerning the Patterson street viaduct?

Mr. Torian: No, sir.

[fol. 199] Mr. Chaffe: Now, some comment has been made here about your method of repairing the decking of the Patterson street viaduct. Will you please state just how the new decking was put on?

Mr. Torian: Yes, sir, the new decking was put straight across the viaduct. It was not quite as long as the old or the bottom decking.

As I stated before, there is about $2\frac{1}{2}$ feet on each side difference in the length of that decking.

Mr. Chaffee: Why is it that you put the new decking over the old decking?

Mr. Torian: To strengthen the structure.

Mr. Chaffe: So, in other words, there is at present a double decking on that structure instead of a single decking?

Mr. Torian: Yes, sir.

Mr. Chaffe: For the full width of the viaduct except for about two feet on each edge?

Mr. Torian: Yes, sir.

Mr. Chaffe: And for that two feet on each edge there is a single decking?

Mr. Torian: Yes, sir.

Mr. Chaffe: In what condition is that single decking?

Mr. Torian: Good condition.

Mr. Chaffe: In so far as you are aware or have ever heard of, directly or indirectly, has there ever been any accident of any kind on the Patterson street viaduct through any failure of any kind of the decking?

[fol. 200] Mr. Torian: I have never heard of any accident on the structure of any kind.

Mr. Norman: Do you know, as a matter of fact, whether or not the Patterson street viaduct is of iron or steel construction?

Mr. Torian: It is of steel construction.

Mr. Norman: Are you positive when you say that the type of iron or steel used in the Patterson street viaduct is the same as that used in the Newton street viaduct?

Mr. Torian: Why, apparently it is the same.

Mr. Norman: Mr. Torian, is it customary for engines to stop under the Patterson street viaduct?

Mr. Torian: Yes, sir.

Mr. Norman: For any length of time?

Mr. Torian: Well, there are engines continually passing there because there is a switch right under the Patterson street viaduct.

Mr. Norman: But I mean do they stop there and make smoke and steam to the extent that parties passing on top of the viaduct cannot see through this smoke and steam?

Mr. Torian: Why, the engines passing under the Patterson street viaduct stop and do their switching and go back, and, of course, when they are passing under the viaduct there is smoke that comes through the decking. How long it continues I cannot say.

Mr. Norman: And the same thing happens under the Newton street viaduct?

Mr. Torian: Yes, sir.

[fol. 201] Mr. Norman: Now, with reference to the manner of maintaining the decking of the Patterson street viaduct, originally the decking was laid at an angle of about 45 degrees,—is that correct?

Mr. Torian: That is correct, yes, sir.

Mr. Norman: What occasioned the placing of the planks on top of this viaduct so that there is a space of approximately two and a half feet on each side of the planks?

Mr. Torian: It was brought about by our having some very fine eypress lumber that came out of our sheds during the time that they were rat-proofing and by cutting them in two we made two 12 foot planks. They were originally 24 foot lengths.

Mr. Norman: When this top decking was placed on wasn't the under decking, as a matter of fact, full of holes in a number of places?

Mr. Torian: There were some holes in it, yes, sir.

Mr. Norman: Now, as these top planks wear out what are the lengths of the planks they are being replaced with?

Mr. Torian: I don't know, Mr. Norman.

Mr. Norman: You pass over the viaduct frequently, don't you?

Mr. Torian: Yes, sir, but I don't remember that they were changing the length of any of the decking the last time I went over the viaduct.

Mr. Norman: So you are not prepared to state, then, what is the present condition of the two and a half foot space on each side of [fol. 202] this top decking that you have just testified to?

Mr. Torian: I was over the viaduct last Thursday and examined it and its condition was good.

Mr. Norman: Well, didn't you notice then whether or not the planks that are being put in this viaduct are longer or shorter or the same length as the old planks?

Mr. Torian: Right at the point where the engines cross they were putting in some additional decking there.

Mr. Norman: But you don't know whether that new stuff extended beyond the old planks or not?

Mr. Torian: No, sir, I didn't notice.

Mr. Norman: In crossing this viaduct have you noticed any holes in this two and a half foot space?

Mr. Torian: I have noticed holes and had them immediately repaired, yes, sir.

Mr. Norman: How were they repaired?

Mr. Torian: They were repaired by patching them.

Mr. Norman: In what way were they patched?

Mr. Torian: Planks put over them and nailed down.

Mr. Norman: In what manner was this planking laid,—was there any space between this planking and the top planking you have just testified to?

Mr. Torian: On the top?

Mr. Norman: Yes, sir. There would be a space, would there [fol. 203] not, for the wheel of an automobile to fall in between the original top planking and this planking you place there to repair these holes?

Mr. Norman: Probably one inch.

Mr. Norman: Are you prepared to say there was only one inch between the original planking and these little planks that you have used to repair these holes?

Mr. Torian: I didn't measure it; of course if you mean where the little plank was placed it may be at the extreme outside.

Mr. Norman: As a matter of fact aren't these planks that are being used to patch up these holes as they appear in this two and a half foot space being placed in a very hap-hazard fashion?

Mr. Torian: Why, I don't think so.

Mr. Norman: Are you prepared to say that the length of the planks with which you are at present repair- this viaduct do not extend beyond the original decking,—the top decking, I mean?

Mr. Torian: I said a moment ago I had not noticed that.

Mr. Norman: I understand you to testify that you have been acting as superintendent of the M. L. & T. Railroad for seven years. Is that correct?

Mr. Torian: Yes, sir.

Mr. Norman: During that time has the M. L. & T. Railroad ever made any repairs to the Newton street viaduct?

Mr. Torian: Not to my knowledge.

[fol. 204] Mr. Norman: How long have you known of the dangerous condition of the Newton street viaduct?

Mr. Torian: Well, I have known for the past two years that it was acutely dangerous; and prior to that time I knew it was going to get dangerous.

Mr. Norman: For about how long a time?

Mr. Torian: About six years.

Mr. Norman: Which is the longer viaduct,—Newton street or Patterson street?

Mr. Torian: I believe the Newton street is a little longer than the Patterson street viaduct.

Mr. Norman: Do you know which is the wider?

Mr. Torian: Yes, sir, Newton street.

Mr. Norman: Of what metal are the beams in the Patterson street viaduct?

Mr. Torian: Steel,—it is a steel structure.

Mr. Norman: I mean the beams that support the flooring or decking?

Mr. Torian: Why, steel.

Mr. Norman: Are you positive of that?

Mr. Torian: I think so, yes, sir.

Mr. Kohn: Mr. Torian, you are familiar with the yards there under the Newton street viaduct,—familiar with the trackage there?

Mr. Torian: Yes, sir.

[fol. 205] Mr. Kohn: How many main leads are there in the yard? When I say main leads I mean—

Mr. Torian: You mean how many tracks?

Mr. Kohn: I mean main leads, for making up trains.

Mr. Torian: One.

Mr. Kohn: One?

Mr. Torian: Yes, sir.

Mr. Kohn: Now, with reference to the yard where is that main lead situated,—near the side or toward the center?

Mr. Torian: The lead runs right from the outside track right

through the yard. I may not know just what you mean. If you mean the lead, then the lead runs out and all tracks run into this lead.

Mr. Kohn: I am speaking of the three principal tracks parallel to the property line of the company through which trains come in on before they are broken up for switching?

Mr. Torian: Why, there are eleven tracks.

Mr. Kohn: Well, the principal ones of those are situated with reference to the Newton street viaduct where,—toward the side of the property or toward the center?

Mr. Torian: Well, they are about the same.

Mr. Kohn: Well, from your observation what part of the Newton street viaduct is in the worst stage of deterioration?

Mr. Torian: Where the engines pass under it.

Mr. Kohn: Where the engines pass under it?

[fol. 206] Mr. Torian: Yes, sir.

Mr. Kohn: Now, would it be preferable, from the railroad company's standpoint, to have a viaduct there in good condition or a grade crossing? Would a grade crossing there impede the traffic of the Southern Pacific? Wouldn't a viaduct be preferable to a grade crossing?

Mr. Torian: I would think that a viaduct would be very much preferable to the public to a grade crossing.

Mr. Kohn: As a matter of fact wouldn't a grade crossing there interfere with the switching of trains and also place an expense on the company aside from probable damage suits that would follow if a grade crossing were opened there?

Mr. Torian: It would impede the switching of trains, yes, sir, and create more costs for flagmen and proper crossing protection.

Mr. Kohn: Then, in your opinion, Mr. Torian, you believe that a viaduct is necessary at that point, about 3,000 feet back from the river?

Mr. Torian: I believe it is preferable to a grade crossing.

Commissioner Williams: Mr. Torian, at the first hearing in this case it was stated that there are twenty two tracks over which this Newton street viaduct is constructed. Now, is it twenty two or eleven?

Mr. Torian: There are eleven tracks,—he asked about tracks used for incoming trains,—that run under the viaduct. Now, the other [fol. 207] tracks run into our shops.

Commissioner Williams: But there are twenty two tracks in all?

Mr. Torian: About that many, yes, sir.

Commissioner Williams: I just wanted to be sure. I heard you say eleven and somebody the other day said twenty two.

Mr. Torian: Well, he asked about tracks for incoming trains.

Commissioner Williams: But there are twenty two tracks under the viaduct, regardless of what purpose they are used for?

Mr. Torian: Yes, sir, about that.

Mr. Chaffe: Do you recall the width of the decking of the Paterson street viaduct, Mr. Torian?

Mr. Torian: No, sir, I do not.

Witness excused.

[fol. 208] Mr. E. J. LEGENDRE was called as a witness, and, having been duly sworn, testified as follows:

Mr. Chaffe: Mr. Legendre, what is your official connection with the Morgan's Louisiana and Texas Railroad?

Mr. Legendre: Supervisor of buildings and bridges on the New Orleans division.

Mr. Chaffe: How long have you occupied that position.

Mr. Legendre: I have been here altogether thirteen years.

Mr. Chaffe: Did you occupy a similar position anywhere else with the Morgan Company before coming here?

Mr. Legendre: No, sir.

Mr. Chaffe: Then this is your first connection with the Morgan Company?

Mr. Legendre: Yes, sir.

Mr. Chaffe: Where is your office situated with respect to the Patterson street viaduct?

Mr. Legendre: It is at 801 Patterson street, one block this side of Elmira street.

Mr. Chaffe: Well, how close is it to the upper end of the Patterson street viaduct?

Mr. Legendre: One block.

Mr. Chaffe: Has Mr. J. R. Norman or any other citizen or citizens ever complained to you about the condition of the decking on the Patterson street viaduct?

[fol. 209] Mr. Legendre: They have not.

Mr. Chaffe: Under whose supervision is the decking on the Patterson street viaduct?

Mr. Legendre: It comes under my supervision.

Mr. Chaffe: Will you please state what is the condition of the decking of the Patterson street viaduct?

Mr. Legendre: The decking on the Patterson street viaduct is in good condition.

Mr. Legendre: I don't want to go over the same facts with you as with Mr. Torian. You heard what Mr. Torian testified to with respect to the method of laying that decking?

Mr. Legendre: Yes, sir.

Mr. Chaffe: And the width of the decking?

Mr. Legendre: Yes, sir.

Mr. Chaffe: How close it comes to the edge, and all that?

Mr. Legendre: Yes, sir.

Mr. Chaffe: Do you corroborate his statements in that regard?

Mr. Legendre: Yes, sir.

Mr. Chaffe: There has also been some testimony here seeking to convey the impression that the Patterson street viaduct was a weak structure. Has there been anything occurred on there recently to indicate whether it is a weak or a strong structure?

Mr. Legendre: Well, here a few weeks ago at the time of the Dock Board fire on the New Orleans side, the whole of Algiers, you [fol. 210] might say, was on that viaduct at one time. I will say there was approximately two thousand people, or in that neighborhood, on it.

Mr. Chaffe: Were there many automobiles and trucks?

Mr. Legendre: There was a double line of them, yes, sir, over nearly the entire length of the viaduct.

Mr. Chaffe: Did any of these trucks or automobiles go through the decking in any spot or spots?

Mr. Legendre: No, sir.

Mr. Chaffe: How long did that condition exist on that occasion?

Mr. Legendre: You mean this weight on there?

Mr. Chaffe: Yes.

Mr. Legendre: I don't know exactly, but I judge an hour and a half to two hours.

Mr. Chaffe: You say the occasion of this crowd being on there was to witness the Dock Board fire?

Mr. Legendre: Yes, sir.

Mr. Chaffe: You mean the recent fire that destroyed part of the Government warehouse wharves?

Mr. Legendre: Yes, sir, that is it.

Mr. Chaffe: What, if any, difference, is there between the exposure, and by exposure I mean atmospheric, gaseous, and all other exposures, between that to which the Patterson street viaduct has been subjected and that to which the Newton street viaduct has been [fol. 211] subjected?

Mr. Legendre: I do not think there would be any. In fact, I believe there is a little more switching under the Patterson street viaduct than there is at Newton street on account of the incline engines continuously working back and forth there.

Mr. Chaffe: I have already asked you about the condition of the decking of the Patterson street viaduct and you said it was good. Now, what is the condition of the structural part of the Patterson street viaduct?

Mr. Legendre: The structural part is good.

Mr. Chaffe: What has been done in the way of maintenance of the Patterson street viaduct, so far as the structure is concerned, during the thirteen years that you have been supervisor of bridges and buildings in the New Orleans terminals?

Mr. Legendre: Well, the structural steel in that viaduct has been sealed and painted,—first sealed and then red-leaded and then painted over that. That has been done every year except in one case it went a little bit over one year, but as a rule that viaduct has been sealed and red-leaded and painted about every year.

Mr. Norman: Mr. Legendre, is the decking of the Patterson street viaduct now being maintained in such a condition or manner that there is on the two and a half foot space that Mr. Torian has testified [fol. 212] to a road that is similar to that popularly known as a corduroy road?

Mr. Legendre: No, sir, there is no corduroy there that I can see. The top decking, you understand, is the wearing surface, and the lower decking is a heavy supporting decking, and then we have placed this top decking two and three inches longer than the wearing surface. That is to protect the lower decking and that is about as close as it is to corduroy.

Mr. Norman: Well, the top decking to which you have just referred, and which is now being used to replace the floor decking as it wears out, is that longer than the old top decking?

Mr. Legendre: Well, in some places it is longer. My idea about that was to eventually get our wearing surface a little bit longer.

Mr. Norman: But in the meantime there are spaces where the road on the side of the bridge is like that of a corduroy road?

Mr. Legendre: Oh, you may possibly find a few spots, but there is no occasion to get on that spot because you have plenty of room on the wearing surface for two cars or two trucks to meet and pass each other.

Mr. Chaffe: Do wagons and automobiles and trucks frequently meet and pass on the Patterson street viaduct?

Mr. Legendre: Yes, sir.

Mr. Chaffe: That is just a common occur-ence?

Mr. Legendre: Every day, yes, sir.

Mr. Chaffe: Do you know how wide the present wearing surface is?

Mr. Legendre: I am not quite positive, but I think about 14 [fol. 213] feet,—either 12 or 14 feet; but I have met other vehicles there very often.

Mr. Chaffe: Now, Mr. Legendre, have you ever seen or heard of, directly or indirectly, or in any manner whatever, of any accident on the Patterson street viaduct at any time due to any defective condition of the decking or any other part of the structure?

Mr. Legendre: I never have.

Mr. Norman: Mr. Legendre, of what material is the construction of the Patterson street viaduct,—by that I mean the stringers that support the decking?

Mr. Legendre: The stringers that support the decking and floor beams are of creosoted timber.

Witness excused.

[fol. 214] Mr. H. H. UECKERT was called as a witness, and, having been duly sworn, testified as follows:

Mr. Chaffe: Mr. Ueckert, what is your official connection with the Morgan Railroad?

Mr. Ueckert: Supervisor of structures of the Texas and Louisiana lines.

Mr. Chaffe: Did you have any technical education?

Mr. Ueckert: Yes, sir.

Mr. Chaffe: Where?

Mr. Ueckert: At the A. & M. College of Texas.

Mr. Chaffe: What did that technical education consist of?

Mr. Ueckert: I took a course in civil engineering and got my degree in 1897.

Mr. Chaffe: What experience have you had in connection with the construction and maintenance of structures?

Mr. Ueckert: I entered the service of the company in 1899 as draftsman in the structural department and continued in that position until I was made chief draftsman of the structural department, about 1910 or 1912, and remained in that position until June, 1916, at which time I was made assistant superintendent of the T & N O Division, for maintenance; and remained in that position until November, 1917, and I was then made supervisor of structures of the Texas and Louisiana lines.

Mr. Chaffe: Under whose jurisdiction are and who is responsible [fol. 215] for the maintenance of all the steel structures belonging to the Southern Pacific Company's Texas and Louisiana lines?

Mr. Ueckert: I am directly in charge of them and responsible to the chief engineer.

Mr. Chaffe: How long did you say you had been in charge of them?

Mr. Ueckert: Since November, 1917.

Mr. Chaffe: Have you ever had occasion to examine the Newton street viaduct in Algiers?

Mr. Ueckert: Yes, sir.

Mr. Chaffe: What sort of an examination did you make,—a superficial examination or a careful examination, or what?

Mr. Ueckert: Well, on February 22 I—

Mr. Chaffe: What year?

Mr. Ueckert: This year,—1922,—Mr. Torian called my attention to the condition of the Newton street viaduct, and in company with Mr. Legendre, supervisor of bridges and buildings, I made a very careful inspection of the structure. In fact, we spent the entire day going over the structure, or, rather, the sub-structure, and we also went over the superstructure, and made a note of the condition of repair it was in and what was necessary to be done to put it in safe operating condition.

Mr. Chaffe: Did you make any further examination of it?

Mr. Ueckert: On July 5 of this year we made another inspection. That time I was accompanied by Mr. Burgis and one of the Assistant City Engineers of the city of New Orleans.

[fol. 216] Mr. Chaffe: What sort of an inspection was that?

Mr. Ueckert: It was a very detailed inspection, similar to the one made in February.

Mr. Chaffe: Did you ever make any further inspection of it?

Mr. Ueckert: Yes, we made another inspection, on your request, on October 17.

Mr. Chaffe: What sort of an inspection was that?

Mr. Ueckert: That was a detailed inspection, in company with Mr. Legendre, the same as the two previous inspections.

Mr. Chaffe: Have you ever inspected the Patterson street viaduct?

Mr. Legendre: Yes, the last time I inspected it was on October 17.

Mr. Chaffe: Of this year?

Mr. Legendre: Yes, sir.

Mr. Chaffe: What sort of an inspection did you make of the Patterson street viaduct,—detailed or otherwise?

Mr. Ueckert: Yes, a detailed inspection. We passed through

below and looked at the condition of the steel and then passed over the top and looked at the condition of the decking.

Mr. Chaffe: Please state what, if any, difference exists between the character of steel used in the construction of the Patterson street viaduct and the character of steel used in the Newton street viaduct. [fol. 217] Mr. Ueckert: There is no difference in the character of the steel.

Mr. Chaffe: What kind of steel is used in both viaducts?

Mr. Ueckert: They are both of what is known as medium steel, made by the open hearth process. That is the process adopted by the American rolling mills for making structural steel and spans and has been in use since about 1880.

Mr. Chaffe: Some questions were asked about the method or type of construction of the Patterson street viaduct. Will you please tell us how the decking is supported in the Patterson street viaduct?

Mr. Ueckert: The main structure consists of girders supported on columns.

Mr. Chaffe: Are those girders of steel or wood?

Mr. Ueckert: They are steel,—what is called built up sections of angles and plates and those girders are provided with floor beams or intermediate beams, or intermediate "I" beams, I should have said.

Mr. Chaffe: Also of steel?

Mr. Ueckert: Yes, the same class of steel; and these floor beams carry wooden stringers on top of which the first floor decking is applied, and then on top of this first decking is placed the wearing surface.

Mr. Chaffe: How wide is the decking on the Patterson viaduct?

[fol. 218] Mr. Ueckert: The girders are 22 feet center; the flange is 12 inches, leaving the decking 21 feet between girders.

Mr. Chaffe: How wide is the wearing surface?

Mr. Ueckert: The wearing surface,—that is the top decking,—it will average approximately 15 feet; and in some places as much as 16 feet.

Mr. Chaffe: Are there any places where it is narrower than 15 feet?

Mr. Ueckert: Why, I could not say positively, but I do not think there is.

Mr. Chaffe: You have not measured each particular spot?

Mr. Ueckert: No, sir.

Mr. Chaffe: But is approximately 15 feet wide on an average?

Mr. Ueckert: It is, yes, sir.

Mr. Chaffe: Have you ever seen two vehicles pass each other on top of the Patterson street viaduct?

Mr. Ueckert: I have.

Mr. Chaffe: Did they have any difficulty in passing each other?

Mr. Ueckert: None at all.

Mr. Chaffe: Now, what maintenance has been given the Patterson street viaduct by the Morgan Railroad?

Mr. Ueckert: They have kept it thoroughly cleaned and painted.

The exposed steel is always coated with red lead and then given a finishing coat of good carbon paint.

[fol. 219] Mr. Chaffe: Have you recently inspected the condition of the decking of the Patterson street viaduct?

Mr. Ueckert: Yes sir.

Mr. Chaffe: What is its condition?

Mr. Ueckert: It is in fair condition and it is absolutely safe.

Mr. Chaffe: What is the condition of the structural part of the Patterson street viaduct?

Mr. Ueckert: It is in excellent condition.

Mr. Chaffe: How long, in your opinion as an engineer, if that viaduct is maintained in the future as it has been in the past, will the structural part of the Patterson street viaduct last?

Mr. Ueckert: Why, it should easily be good for forty years more.

Mr. Chaffe: During the time that you have had anything to do with the Patterson street viaduct has there been any other maintenance of the structural part of the viaduct except this scraping and painting when needed?

Mr. Ueckert: None whatever.

Mr. Chaffe: No new members have been put in?

Mr. Ueckert: No, sir.

Mr. Chaffe: Will there be any necessity for any new members being put in in the next forty years, say, if it is maintained in the future as it has been in the past?

Mr. Ueckert: No, sir.

[fol. 220] Mr. Chaffe: Had the Newton street viaduct had the same maintenance as the Patterson street viaduct, how long, in your opinion as an engineer, would it have lasted?

Mr. Ueckert: Why, it should last as long as the Patterson street structure, and I would put the minimum life at fifty years.

Mr. Chaffe: Why do you make it ten years longer than the Patterson street viaduct?

Mr. Ueckert: Well, the Patterson street viaduct has already served twenty-six years, and it should be good for forty years more the way it is maintained.

Mr. Chaffe: The other viaduct has served ten years less?

Mr. Ueckert: Well, it should serve as long, if maintained in the same condition.

Mr. Chaffe: Now, has any of the structural part of the Newton street viaduct been permitted through lack of maintenance and care to disintegrate?

Mr. Ueckert: Yes, sir.

Mr. Chaffe: What parts, just generally speaking?

Mr. Ueckert: The entire structure has been neglected,—the entire steel structure.

Mr. Chaffe: In order to repair the Newton street viaduct will it be necessary to renew any part of the members?

Mr. Ueckert: Yes, in the condition it is at the present time it will be necessary to renew four spans in the center of the structure,—[fol. 221] that is, four of the main spans, including the main girders, floor beams and stringers.

Mr. Chaffe: How about the up-rights, or columns?

Mr. Ueckert: There are sixty bents of three columns each, of which 135 columns between the north and south abutments have become so deteriorated at the base that it will be necessary to reinforce them by enclosing them in a new concrete base resting on the old base.

Mr. Chaffe: Had the Newton street viaduct been kept scraped and painted, or had the steel portion of that viaduct been kept scraped and painted, would it have been necessary at this time to renew any part of it or to replace any of the original steel structure?

Mr. Ueckert: No, it would not.

Mr. Chaffe: Would it have been necessary to reinforce the base of these columns that you have just mentioned?

Mr. Ueckert: No, sir; the condition of the base of the columns has been aggravated by filling in the base with loose gravel and coating the top of that with a thin layer of pitch, which, after a short time became deteriorated and cracked, allowing the moisture and rain from the top or deck to trickle down the column and seep into this gravel,—that moisture has gotten in there and started corrosion inside of the base and has eaten that portion of the column practically in two.

[fol. 222] **Mr. Chaffe:** How long, in your opinion, would it have been had this Newton street viaduct, or the steel portion thereof, been kept painted and scraped before it would have been necessary to have renewed any part of it or to reinforce these bases?

Mr. Ueckert: Why, renewal or replacement should not have been necessary for fifty years, as long as the traffic remained of the same character.

Mr. Chaffe: You mean the traffic over it?

Mr. Ueckert: Yes, I mean the traffic over it.

Mr. Chaffe: Do you know who put this pitch and gravel at the foot of the columns?

Mr. Ueckert: Why, only from information gained from Mr. Burgis, who told me that he had it put in with his own forces.

Mr. McCaleb: Mr. Ueckert, how many of these columns in the Newton street viaduct rest on the right of way of the Southern Pacific or on the Southern Pacific's property?

Mr. Ueckert: I do not remember.

Mr. McCaleb: Approximately, then?

Mr. Ueckert: There are approximately 600 feet of the steel portion of the viaduct inside the railroad company's property, and those spans,—I can probably tell you from my report exactly where the fence line begins,—approximately nine bents out of the sixty.

Mr. McCaleb: That would be sixty columns?

[fol. 223] **Mr. Ueckert:** No, that would be nine times three,—approximately twenty-seven columns inside of the property line.

Mr. McCaleb: Approximately what is the diameter of these columns resting on the ground?

Mr. Ueckert: The columns vary. They are made up of different sections.

Mr. McCaleb: What is the average width of them?

Mr. Ueckert: They have a concrete foot and the base of those columns will vary anywhere from approximately 16 inches square to 24 inches square, depending on the construction of the individual column.

Mr. McCaleb: What is the diameter of the concrete footing?

Mr. Ueckert: Well, I could not give that information for the reason that you only have the surface to judge from. I have never seen the detail plan of the concrete foundations.

Mr. McCaleb: How high are those columns?

Mr. Ueckert: They will average approximately,—the columns proper will average approximately twenty feet. They will vary from twenty to twenty-two feet.

Mr. McCaleb: What was the reason for making them twenty feet?

Mr. Ueckert: Well, I say the height varies from twenty ~~two~~ twenty two feet.

Mr. McCaleb: I understand that, but—

Mr. Ueckert: Well, over the tracks we require a height of twenty- [fol. 224] two feet in order to provide clearance for men on top of trains passing under the structure,—to prevent train men from being struck when they are on top of cars passing under the structure.

Mr. McCaleb: In other words it was necessary to make it that high in order to permit trains to pass under it with safety to the employees of the company?

Mr. Ueckert: Certainly, yes, sir.

Mr. Kohn: Mr. Ueckert, at whose solicitation was the first inspection made of the Newton street viaduct?

Mr. Ueckert: Mr. Torain first called my attention to it,—to the condition of the structure, and, if I am not mistaken, he reported its condition to Mr. Parsons.

Mr. Chaffe: Mr. Parsons is vice-president of the Morgan Railroad?

Mr. Ueckert: Yes, sir.

Mr. Kohn: Why was the company interested in the condition of the Newton street viaduct at that time?

Mr. Ueckert: We have the same interest in that structure which passes over our property as we have in any structure on the entire system; and when it reaches a condition that we consider dangerous we call it to the attention of the county authorities, or whoever may be responsible for its care and maintenance.

Mr. Norman: You have testified that the condition of the base of certain columns was bad due to the fact that a certain preparation of pitch and gravel had been placed around them. Is that correct? [fol. 225] Mr. Ueckert: Now, not around them, but inside of the base itself.

Mr. Norman: Do you know whether or not your railroad company ever made any objection to the placing of this pitch and gravel inside the base of these columns?

Mr. Ueckert: As far as I am concerned I knew nothing of it until I made this inspection in February. Our policy is to fill the bases with solid concrete, giving it just enough bevel to shed the water off.

Mr. Norman: I think you have testified that if the Newton street

viaduct had been maintained in a similar manner to that of the Patterson street viaduct that it would be in good condition today?

Mr. Ueckert: Yes, sir.

Mr. Norman: That is correct?

Mr. Ueckert: That is correct.

Mr. Norman: Has your company ever maintained any portion of the Newton street viaduct?

Mr. Ueckert: Not to my knowledge.

Mr. Norman: You said the condition of these columns was due to moisture which seeped down?

Mr. Ueckert: Yes, water and urine, etc. That is always considered as partly the cause of excessive corrosion of steel when below any highway structure. Urine will accumulate on the decking and [fol. 226] when a rain comes it carries it down to the steel work below, and it assists nature in causing corrosion quicker than under ordinary conditions.

Mr. Norman: Did you find that condition in all of the columns?

Mr. Ueckert: Practically all of the columns that had an enclosed base. The other columns were of a different type of construction. That is, they were of web construction, with the two angles back to back on each side, which leaves the base entirely free and exposed to air and sunlight, and those columns were in fair condition,—that is, in fair condition with the exception of the base plate on which they rest, but the moisture had accumulated there and they showed more depression than the upright portion of the columns.

Mr. Norman: These columns you are referring to as having been affected by urine, where are they located?

Mr. Ueckert: They are located all over the entire structure,—from the north abutment to the south abutment.

Mr. Norman: Well, which columns showed the greatest depreciation?

Mr. Ueckert: The ones that are constructed of two channels and latticed together above the base with the base enclosed for a distance of about 10 inches, with side plates. Those side plates are put on for the purpose of distributing the load over the base. That is, the side plates are provided with angles in order to distribute the load [fol. 227] over a greater area, which forms a box in the base of your column in which this gravel had been placed, with a pitch top over it, and after a time it had become cracked allowing the moisture to trickle down into it. It holds moisture, though, of course, it allows a certain amount of air to get in there also, which keeps that column constantly subjected to corrosion.

Mr. Norman: Where are these columns located with reference to the Southern Pacific's right of way?

Mr. Ueckert: They run practically uniform throughout the entire structure, outside of the right of way the same as inside of the right of way. The percentage will run practically the same.

Mr. Norman: Now, with reference to the Patterson street viaduct you stated that there was a width of twenty one foot between girders?

Mr. Chaffe: He said twenty two feet between centers of the girders.

Mr. Ueckert: Twenty two feet center to center of girder, which would leave a clear width of twenty one feet for your road way.

Mr. Norman: As a matter of fact isn't a portion of that taken up with a walk for pedestrians?

Mr. Ueckert: That is carried on the outside with a bracket.

Mr. Kohn: Do you know whether or not where the concrete foot- [fol. 228] ings are whether the Southern Pacific ever sold that to the city by deed?

Mr. Ueckert: You mean outside of the fence?

Mr. Kohn: No, sir, on the inside of the fence?

Mr. Ueckert: Whether they ever sold it to the city?

Mr. Kohn: Yes, sir, the land that these footings cover?

Mr. Ueckert: No, sir, I do not.

Mr. Chaffe: That is my case, Mr. Commissioner. I have, however, these ordinances which I have offered—

Commissioner Williams: I don't know that those ordinances will play any part in this case.

Mr. Chaffe: I would like to file them.

Commissioner Williams: They must be filed within the next day, then.

Mr. Chaffe: I will file them this afternoon.

Commissioner Williams: All right.

Mr. Chaffe: I now ask that this case be set down for argument before the whole Commission.

Commissioner Williams: I don't know just when the Commission will meet, but if that is the wish of the entire Commission it will be perfectly satisfactory to me, provided the whole Commission wants it and is in favor of it.

Mr. Chaffe: Then I object to the Commission passing on this matter without a hearing because under the rules of the Commission I am entitled to a hearing before the whole Commission before this matter can be passed on.

Commissioner Williams: Well, in answer to that objection I will say this: that I am acting under a resolution adopted by the entire Commission and that the entire Commission will be called on to consider the recommendations I make in this matter. Now, the Commission will either approve those recommendations and issue an order based on them or they will disapprove of the recommendations. Now, for the benefit of everybody concerned, including the general public, I will say this: as I said in the beginning of this hearing there are only two questions involved in this case,—the question of the necessity for a viaduct at Newton street in Algiers and the question of the legal liability of some one to provide that viaduct. I have the opinion of our counsel, which opinion I secured before I ever countenanced or entertained this petition, that the Louisiana Public Service Commission has jurisdiction over this matter, and that it can, if it finds it necessary, or, rather, it can, if it finds a viaduct necessary at Newton street in Algiers, legally oblige the Southern Pacific, or the M. L. & T. R. R. & S. S. Co., to build such a structure. As I said before, before we ever entertained this petition I sought the advice of our counsel, who advised me in the manner I have just stated. The only question in my mind at this time involved in this proceeding is the question of the necessity and [fol. 230] that of liability; and it seems to me that the question of

necessity is an admitted one. What I want to get clear in the record is the fact that this hearing was not one brought about by any desire on my part to take anything but a legal position; and, therefore, before I ever entertained the petition I got the advice of our counsel to the effect that I have stated. As I have said, an order in this matter will be recommended to the Commission and if the Commission accepts my recommendations that will be the order and if they disapprove then a different kind of order will be entered. I don't know what the other members of the Commission will do. The hearing is adjourned.

(Whereupon, at 3:25 p. m., on November 6, 1922, the hearing in the above numbered and entitled matter was closed.)

[fol. 231] Reporter's certificate omitted in printing.

[fol. 232] LOUISIANA PUBLIC SERVICE COMMISSION

No. 165

RESIDENTS OF FIFTH DISTRICT OF LOUISIANA

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY

In the Matter of Repairing of Newton Street Viaduct

PETITION FOR REHEARING OF M. L. & T. R. R. & S. S. Co. TO
LOUISIANA PUBLIC SERVICE COMMISSION—Filed ———, ———

Now before this Honorable Commission comes Morgan's Louisiana & Texas Railroad & Steamship Company and excepts to this proceeding and for cause of exception says that this Honorable Commission is without jurisdiction to entertain, hear or determine the complaint herein filed.

Wherefore, Morgan's Louisiana & Texas Railroad & Steamship Company prays that this exception be maintained and the complaint herein filed dismissed.

Denegre, Leovy & Chaffe, Attorneys for Morgan's La. & Tex.
R. R. & S. S. Co.

Order No. 82

[Title omitted]

In re Newton Street Viaduct, Algiers

PETITION FOR REHEARING

To the Honorable the Louisiana Public Service Commission:

The petition of the Morgan's Louisiana & Texas Railroad & Steamship Company, defendant herein, with respect represents, that Order No. 82, dated November 11, 1922, is illegal, null and void and that a re-hearing should be granted herein for the following among other reasons to-wit:

I. The Order complained of is null, void and of no effect and should be set aside for the reason that the Honorable the Louisiana Public Service Commission is without power, jurisdiction or authority to render the order complained of.

II. The Commission erred in finding as a fact that streets (except Patterson Street) had ever been laid out across defendant's property in Algiers, Louisiana, or the right to cross same or to use same for public purposes had in any manner been acquired except to the extent and under the conditions set forth in the ordinance under which the Newton Street Viaduct was constructed; the fact being that defendant is the owner of a strip of land measuring three hundred and seventy-five (375) feet front on the Mississippi River and twenty-four arpents in depth, bounded on the west by what was formerly Verret Avenue and on the East by Thayer Avenue through which no streets have ever been laid out and through which the right to cross same has never been acquired by the City of New Orleans or any person, firm or corporation or body politic or any other person, firm or corporation or body politic. That said property was acquired by defendant in the foreclosure proceeding against [fol. 234] New Orleans Opelousas & Great Western Railroad Company by United States Marshal/ deed dated July 1, 1869; said New Orleans Opelousas & Great Western Railroad Company having acquired said property by deed dated December 16, 1852 and across which property the order herein complained of required defendant to provide a safe and suitable traffic viaduct.

III. The Commission erred in finding as a fact that streets across defendant's property above described had been closed in consideration of the payment by the City of New Orleans of the sum of Ten thousand (\$10,000.00) Dollars; there being no evidence whatever in this record on which to base any such finding, and the fact being that the streets which were closed in consideration of the payment of Ten thousand (\$10,000.00) Dollars constituted the cross streets

from and including Pelican Avenue to Lamark Street between Atlantic Street and what was formerly Verret Street together with Verret Street; said streets being closed only after defendant had acquired by purchase all of the property bounded by said streets.

IV. The Commission erred in disregarding the contract obligations of the City of New Orleans as set forth in the agreement under which the City was granted and obtained permission to cross defendant's property; all of which is set forth in the ordinance with reference thereto offered in evidence by defendant.

V. The Commission erred in declining to permit defendant to offer evidence showing that the South New Orleans Light & Traction Company had assumed and was under the legal obligation to repair and maintain the present Newton Street Viaduct.

VI. The Commission erred in not finding that in so far as defendant is concerned the City of New Orleans is obligated to repair and maintain the Newton Street Viaduct.

[fol. 235] VII. The Commission erred in not finding that the South New Orleans Light & Traction Company, in so far as the City is concerned, is obligated to repair and maintain the Newton Street Viaduct.

VIII. The order complained of denies to defendant equal protection of the law.

IX. The order complained of deprives defendant of its property without due process of law.

X. The order complained of violated the provisions of the Constitution of the United States prohibiting violation of contracts.

XI. The Order complained of is null and void because the Commission declined to permit defendant to argue the case before the Commission and because the order was not rendered in Session as required by the Constitution of the State of Louisiana for the year 1921, and because it is unreasonable.

XII. The order complained of is null and void for other errors manifest on the fact of the record and contained in the opinion rendered herein.

Wherefore defendant prays that it may be permitted to argue this application before the Commission on a date to be fixed by the Commission and that after due and legal proceedings has the order complained of be set aside and a new trial granted herein.

Defendant further prays for all general and equitable relief.

(Signed) Denegre, Leovy & Chaffe, Attorneys for Morgan's Louisiana & Texas Railroad & Steamship Company, Defendant.

[fol. 236]

EXHIBITS IN EVIDENCE

Letterhead of Southern Pacific Lines

Office of Bridge & Building Supr.

Algiers, La., December 14th, 1921.

South New Orleans Light & Traction Co.,
Algiers, La.

DEAR SIRs:

Please refer to my letter of November 11th, in which I advised you of the condition of the Newton St. Viaduct. I am again writing you to call your attention to the condition of this viaduct, as same has been neglected so badly that it is getting unsafe for traffic, due to the fact that the iron has been eaten through in several places by rust.

I will be glad to go over this viaduct with your representative and show him the bad spots that exist in this viaduct. Firmly trusting that you will give this matter your prompt attention, I am,

Yours truly, (Signed) E. J. Legendre, B. & B. Supr. C. C.
P. B. Torian.

[fol. 237]

United States Railroad Administration

Director General of Railroads

Southern Pacific Lines

Office of Bridge & Building Supervisor

Algiers, La., Nov. 11, 1921.

South New Orleans Light & Traction Co.,
Algiers, Louisiana.

GENTLEMEN:

I beg to advise that the Steel on the Newton St. Viaduct is in very — condition, a good many of the steel columns which are the main supports of the viaduct are rusted through.

This matter should be given your immediate attention as this viaduct is very dangerous in its present condition.

Yours truly, E. J. Legendre, B. & B. Supr. C. C. P. B.
Torian.

[fol. 238]

EXHIBIT IN EVIDENCE

Newton Street Viaduct

Estimated Cost of Repairs to Structural Steel Work

Renewal of 1 48' and 1 66' Pl.
Girder Span Complete:

1 48' Pl. Girder span approx. 45,000#	
@ .05	\$2,250.00
1 66' Pl. Girder span approx. 72,000#	
@ .05	3,600.00
Freight on 117,000 pounds.....	1,170.00
Labor erecting, including removing and replacing floor	2,500.00
15% Incidentals	1,428.00
	<hr/>
	\$10,948.00

Encasing bases of 81 columns:

25 Cu. Yds. Concrete pedestals @ 20.00...	500.00
Forms for 81 cols. average @ 2.00.....	162.00
Cleaning out base of cols. @ .50.....	105.38
	<hr/>
	807.88

Cleaning and painting viaduct:

1,491 Lin. Ft. cleaning with sand blast	
@ 1.50	2,236.50
Painting with spraying machine @ 2.00..	2,982.00
	<hr/>
	5,218.50

Fastening Hand Railing:

2,982 Lin. Ft. approx.	300.00
	<hr/>
Total approx.	17,275.00

NOTE.—Repairs and resurfacing of street railway tracks, also high-way floor not included.

(The above estimate was made by Mr. H. H. Ueckert, Engr. of Structures, Southern Pacific Lines.)

[fol. 239]

EXHIBIT IN EVIDENCE

The Newton Street Viaduct, Located in Algiers, New Orleans, La.

Description of Structure

The Newton Street Viaduct extends from the east side of Elmira Avenue to the West side of Whitney Avenue, a distance of 1,977 feet.

It is located on and over Newton Street, and was built for the purpose of carrying Newton Street across the property and over the 22 tracks of the Morgan's Louisiana & Texas Railroad.

It consists of a long steel trestle, with earth-filled, concrete, inclined approaches at each end of the steel trestle.

The approach at the west end (Elmira Ave. end) is 259 ft.-6 inches long; the steel trestle is 1,493 ft.-6 inches long; and the approach at the east end (Whitney Ave.) end is 224 feet long.

Provision is made, throughout the entire length of the structure, for a highway for vehicles and street car line having a width of 28 feet, and for a side walk for pedestrians, on each side of the highway, each having a width of 7 feet. A total width, including side walks and driveway, of 42 feet.

A street car track is laid in the highway, the center line of the track being located 7 feet from the center line of the viaduct toward the south side.

The surface of the track rails is at the same elevation as the surface of the highway on the steel trestle portion and also on the approaches, that is to say the rails are flush with the driveway surface.

The inclined approaches for highway and side walks are built upon an earth fill which is held between concrete retaining walls, and they terminate at concrete abutment walls, which abutment walls furnish support to the first and last spans of the steel trestle.

The highway on the approaches is surfaced with gravel and shells, including the portion occupied by the street car track. The side walks on the approaches being cement paved, for a distance extending from the street intersection at each end of the viaduct to the abutment walls.

On the steel trestle portion, the pavement, or decking, of both highway and side walks, is of wood planking, nailed to wooden stringers, which stringers are bolted to the steel floor system.

The approaches are in good condition, as regards both the highway and side walks. The steel trestle is much deteriorated in numerous [fol. 240] places and in some places it is in such bad condition as to be unfit for use and dangerous.

The steel trestle consists of 61 spans, ranging in length from 14 feet to 66 feet. These spans are supported by 60 steel bents, each bent having 3 steel posts or columns.

In clear height, above the ground and above the steam road tracks, the steel spans range from a height of about 10 feet at the abutment walls to a clear height of 22 feet in the portion crossing over tracks of the M. L. & T. R. R., the high level portion being 413 feet long.

The 180 steel posts or columns are of built up construction, some being of "I" beam with cover plate type, and some are of lattice construction.

The steel span girders also differ in design, some being of "I" beam type, others are plate and angle girders, and others are latticed.

The steel floor beams and stringers also vary in type and dimensions, on the spans of differing lengths, some being "I" beams, some channels, some latticed, and some built up throughs.

In some parts the bridge is of flush deck construction, and in other

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parts there are "through" spans in which the deck is carried below the top of the main span girders.

On the outer side of each side walk there is a pipe-work hand railing.

The grades of the highway and side walks are as follows:

From the foot of the West approach to the abutment wall, a distance of 259 ft. 6 inches, the ascending grade is 3.886 per cent.

From the west end of the steel trestle at the abutment, and for a distance of 472 ft. 6 ins. the grade continues at 3.886 per cent.

For the next 175 ft. 4 ins. to the east side of Verrett Ave. the grade is 1.00 per cent.

From the east side of Verrett Ave. for a distance of 377 ft. 8 ins., the highway and side walks are level.

The descending grade starts at a point 14 feet west of the west side of Thayer Ave. and is carried for a distance of 468 feet on the steel trestle at a grade of 3.876 per cent.

On the east approach, from the abutment wall to Whitney Ave. the descending grade is 224 feet long and at a grade of 3.876 per cent.

(Signed) E. W. Burgis. Oct. 4th, 1922.

Vol. 241] MINUTES OF LOUISIANA PUBLIC SERVICE COMMISSION

Secretary's Certificate to following papers omitted in printing.

Vol. 242] EXHIBIT IN EVIDENCE

Extract from the Minutes of Louisiana Public Service Commission,
Vol. 4, Page 98

New Orleans, Louisiana, October 4, 1922.

"In accordance with resolution adopted September 23, 1922, Commissioner Francis Williams took up for hearing and consideration—

Case No. 165

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

ORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

In re Repairing Newton Street Viaduct

Secretary Jastremski and Official Reporter Sherer were present.

Appearances: E. H. McCaleb; representing South New Orleans Light & Traction Company; Edwin C. Kahn, representing citizens

of Algiers; H. H. Chaffe, representing M. L. & T. R. R. & S. S. Co.; H. A. Fitzpatrick, representing Fire Board of New Orleans.

Witnesses: H. A. Fitzpatrick; H. A. Wren; J. H. Lewis; W. W. Hoflettes; E. P. Odenhal; J. R. Norman.

The hearing then adjourned until 1:30 p. m., for lunch.

Afternoon Session

The hearing reconvened at 1:30 p. m., with the same appearances as were at the morning session.

Witnesses: P. S. Lawton; E. W. Burgess; B. Vallas, Assistant City Engineer; J. Bodengeux; A. Spitzfaden, jr.

The hearing was continued until Friday, October 13, 1922.

Extract from the Minutes of Louisiana Public Service Commission,
Vol. 4, Page 107

New Orleans, Louisiana, October 13, 1922.

In accordance with resolution adopted September 23, 1922, Commissioner Francis Williams took up for further hearing—

Case No. 165

RESIDENTS OF THE 5TH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

In re Repairing of Newton Street Viaduct

The case was called and continued with a view of bringing about an adjustment.

Extract from Minutes of Louisiana Public Service Commission,
Vol. 4, Page 115

New Orleans, Louisiana, November 3, 1922.

In accordance with resolution, and in accordance with continuance from previous hearing, Commissioner Francis Williams this day at 10:00 called for further hearing and consideration—

[fol. 243]

Case No. 165

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

In re Repairing Newton Street Viaduct

Appearances: H. H. Chaffe; E. H. McCaleb; E. M. Kahn, and William H. Norman.

At the request of Mr. H. H. Chaffe the case was continued until Monday, November 6, 1922, at 11:00 a. m.

Extract from Minutes of Louisiana Public Service Commission,
Vol. 4, Page 116

New Orleans, Louisiana, November 6, 1922.

In accordance with adjournment, Commissioner Francis Williams, at 10:00 a. m., this day, in the Council Chamber of the City Hall, City of New Orleans, took up for final hearing and consideration—

Case No. 165

RESIDENTS OF FIFTH DISTRICT CITY OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

In re Repairing Newton Street Viaduct

Appearances: H. H. Chaffe; E. H. McCaleb; W. H. Norman, and Ed. Kahn.

Witnesses: Mr. Burgin; B. J. Oliviera; Assistant City Engineer.
A recess was then taken until 1:15 p. m., for lunch.

Afternoon Session

The hearing reconvened at 1:15, and the following witnesses heard: P. B. Torcau, Superintendent; E. J. Legendre, Superintendent Bridges, etc.; H. H. Weckert, Superintendent of Structures.

The case was then taken under advisement.

Extract from Minutes of Louisiana Public Service Commission,
Vol. 4, Page 119

Baton Rouge, Louisiana, November 11, 1922.

The Commission took up for consideration and decision the following case:

Case No. 165

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY

In re Newton Street Viaduct, Algiers

On motion, duly seconded and carried, it was ordered that plans be filed, and that 90 days after approval of plans a viaduct be completed and open for traffic.

The Secretary was authorized and instructed to issue order accordingly. (Order No. 82.)

The Order in this case (Order No. 82) was signed by Commissioners Huey P. Long and Francis Williams, and Secretary Henry Jastremski.

[fol. 244] Extract from Minutes of Louisiana Public Service Commission, Vol. 4, Page 125

Case No. 165

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

In re Newton Street Viaduct

New Orleans, Louisiana, November 24, 1922.

Arguments on the application for rehearing were made by the following:

H. H. Chaffe; W. M. Barrow; W. H. Norman, and E. H. McCaleb.

After argument, the matter was taken under advisement.

Extract from Minutes of Louisiana Public Service Commission,
Vol. 4, Page 128

Case No. 165

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY

In re Newton Street Viaduct, Algiers

(Application for Rehearing)

Baton Rouge, Louisiana, December 1, 1922.

On motion, duly seconded and carried, the application for rehearing was denied. Order No. 82 ratified and affirmed and readopted; and plans and specifications to be submitted to the Commission for approval, and ninety days after approval of plans the viaduct to be opened for traffic.

The Secretary was authorized and instructed to issue order accordingly. (Order No. 84.)

The Commissioners and Secretary then signed the following order:

Order No. 84

Case No. 165. Residents of the Fifth District of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company. In re Newton Street Viaduct, Algiers. (Application for rehearing.)

[fol. 245] PETITION OF RESIDENTS & PROPERTY HOLDERS OF FIFTH DISTRICT OF NEW ORLEANS, LA.

To the Louisiana Public Service Commission:

We, the undersigned citizens, residents and property holders of the Fifth District of New Orleans, State of Louisiana, hereby petition your honorable body to require the M. L. & T. Railroad & Steamship Company (Southern Pacific Railroad Company) to immediately proceed to reconstruct, repair and maintain the Newton Street viaduct in said Fifth District of New Orleans known as Algiers.

(Signed) Frank W. Lawson, Lower Algiers; George L. Lawson, Lower Algiers; Albert F. Rice, Lower Algiers; Theodore J. Lawson, Lower Algiers; W. C. Forrest, Lower Algiers; Miss J. Lawson, Lower Algiers; Mrs. J. Forrest, Lower Algiers; E. L. Lawson, Lower Algiers; A. N. Wall, Lower Algiers; T. Wattigney, Henry Alonza, John Rice, L. G. Cox, John G. Tentelburg, 1024 Farragut, St. Algiers;

Joseph Fillol, Oakdale, Lower Algiers; J. Cauvin, 1041 Farragut St.; W. J. Lewis, Lower Algiers; S. A. Costello, Lower Algiers; John H. Fisher, Lower Algiers; J. H. Lewis, Lower Algiers; A. Calinsano, Lower Algiers; Aug. Gaspard, Jr., Lower Algiers; P. Rousee, Lower Algiers; F. E. Huget, Lower Algiers; Malvina M. Huget, Lower Algiers; Louis Charnard, Lower Algiers; G. E. Gillis, Lower Algiers; S. K. Shaffer, Lower Algiers; Emile H. Benever, Lower Algiers; Clifford Hintz, Lower Algiers; Frank Todaro, Jos. Gondrella, Collice Musachia, P. Raudoste, Jos. Alonzo, J. O. Valeth, L. T. Baudean, E. M. Wattegnay, 503 Wagner St., Algiers; R. E. Hammond, J. C. McCloskey, E. B. Newton, 1813 Newton Street, Algiers; J. W. Choate, S. M. Bright, G. W. Green, H. A. Schulz, Bernard P. DeRocha, Joseph A. Milan, J. Simon, 1037 Farragut St., Algiers; M. S. Eillol, W. W. Hofsetter, 2201 Newton St., Algiers; Nicholas Ropponolo, P. Cerniglio, Lwr. Algiers; Tony Salomonie, R. Anderson, Lower Algiers; Jos. De Corte, C. W. Bastion, Lower Algiers; P. Ochello, Lower Algiers; Jos. Hugnet, Lower Algiers; H. G. Hugnet, Lower Algiers; Rue F. Schaffe, Lower Algiers; S. M. Gillis, Lower Algiers; B. J. Benoit, Lower Algiers; Matthew Pusso, Lower Algiers; Robert Smith, Lower Algiers; Wm. Serpas, Lower Algiers; Joe H. Musachia, Lower Algiers; L. De Rocha, Lower Algiers, R. Serpas, Lower Algiers; W. B. Kekocha, Lower Algiers.

[fol. 246] BEFORE THE LOUISIANA PUBLIC SERVICE COMMISSION

[Title omitted]

Notices of La. Public Service Commission

SUMMONS

GREETING:

You are hereby summoned to comply with the demand contained in the petition of the plaintiff in the above numbered and entitled cause, (a duly certified copy of which is hereto attached and herewith served), or to file your answer in writing, and in triplicate, in the office of the Louisiana Public Service Commission, at Baton Rouge, Louisiana, in ten days after service hereof.

Witness the Honorable Louisiana Public Service Commission, At Baton Rouge, Louisiana, this 22nd day of September, 1922.

A true copy: (Signed) Henry Jastremski, Secretary.

(Signed) Henry Jastremski, Secretary Louisiana Public Service Commission.

Mr. John McGraw, General Agent Morgan's Louisiana & Texas Railroad & Steamship Co., New Orleans, Louisiana.

[fol. 247] LOUISIANA PUBLIC SERVICE COMMISSION

NOTICE OF HEARING

Notice is hereby given, That the following case has been assigned for hearing before Commissioner Williams, at the City Hall, in New Orleans, Louisiana, at 10:00 a. m., on Wednesday October 4, 1922, and all interested parties are requested to be present, or they may be represented by an Attorney-at-Law or in fact.

Written arguments or affidavits in support of complaint or answer may be filed with the Secretary of the Commission at Baton Rouge at any time prior to or at New Orleans at the time of hearing.

No. 165. Residents of the Fifth District of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company. In the matter of Repairing of Newton Street viaduct.

By order of the Commission.

Baton Rouge, Louisiana, September 23, 1922.

(Signed) Henry Jastremski, Secretary.

Mr. John McGraw, Mr. Frank W. Lawson, Algiers; Mr. John H. Lewis, Algiers; Mr. W. W. Hofstetter, 2201 Newton Street, Algiers.

[fol. 248] LOUISIANA PUBLIC SERVICE COMMISSION

Case 165

Baton Rouge, Louisiana, October 17, 1922.

CORRESPONDENCE

Messrs. Denegre, Leovy & Chaffé,
Whitney-Central Building,
New Orleans, Louisiana.

GENTLEMEN:

Please be advised that Case 165 on the docket of the Commission, Residents of the Fifth District of New Orleans vs. Morgan's Louisiana and Texas Railroad and Steamship Company, in re viaduct at Newton street, Algiers, is assigned for further hearing before Commissioner Williams, at 10:00 a. m., on Friday, October 20, 1922, in the council chamber of the city hall, New Orleans.

Yours truly, (Signed) Henry Jastremski, Secretary.

[fol. 249] LOUISIANA PUBLIC SERVICE COMMISSION

Case 165

Baton Rouge, Louisiana, November 7, 1922.

Messrs. Denegre, Leovy & Chaffe,

General Attorneys Morgan's Louisiana and Texas Railroad and
Steamship Co.,
New Orleans, Louisiana.

GENTLEMEN:

Mr. Henry H. Chaffe

Referring to the request of Mr. Henry H. Chaffe that argument be had before the full Commission in the matter of Residents of the Fifth District of New Orleans vs. The Morgan's Louisiana and Texas Railroad and Steamship Company, in re Repairs to Newton Street Viaduct in Algiers, I have to advise that this request has been submitted to the Commission and I am directed to inform you that the Commission does not desire to hear argument in this matter. The full record as made up in the various hearings will be duly considered by the entire Commission and thereafter an order will be issued in due course.

Very truly, (Signed) Henry Jastremski, Secretary.

[fol. 250] LOUISIANA PUBLIC SERVICE COMMISSION

RESOLUTION APPOINTING WILLIAMS, COMMISSIONER TO TAKE
TESTIMONY

On motion, duly seconded and carried, the following resolution was adopted:

"Resolved, That Francis Williams, Commissioner, be, and he is hereby authorized, empowered and appointed for and in behalf of Louisiana Public Service Commission to conduct an investigation and hear testimony and to have said testimony reduced to writing, and thereafter to report to this Commission, with his recommendations and findings for such action as the Commission may find proper and necessary, in the City of New Orleans, at such time and place as may hereafter be designated, and to continue said investigation from day to day, as may appear necessary, in the following case on the docket of Louisiana Public Service Commission:

Residents of the fifth district of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company. No. 165. In re Repairing of Newton Street Viaduct.

By order of the Commission

Baton Rouge, Louisiana, September 23, 1922.

(Signed) Huey P. Long, Jr., Chairman. (Signed) Henry
Jastremski, Secretary.

[fol. 251]

TELEGRAM

Assignment of Argument Before Entire Commission

Baton Rouge, Louisiana, November 21, 1922.

Denegre, Leovy & Chaffe,
New Orleans, Louisiana:

At the end of its regular session on Friday November twenty fourth at the council chamber city hall New Orleans the Commission will hear argument on application for rehearing Newton Street viaduct case.

(Signed Henry Jastremski, Secretary.

[fol. 252] LA. PUBLIC SERVICE COMMISSION ORDER

No 82—Filed January 27, 1923

Secretary's certificate omitted in printing.

[fol. 252-a] LOUISIANA PUBLIC SERVICE COMMISSION

Order No. 82

RESIDENTS OF THE FIFTH DISTRICT OF NEW ORLEANS

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY

In re Newton Street Viaduct, Algiers

This is a proceeding instituted by citizens of the Fifth District of the City of New Orleans (Algiers), La. against the Morgan's Louisiana and Texas Railroad and Steamship Company to compel the said M. L. & T. R. R. & S. S. Co. to provide a viaduct (bridge) for vehicles, pedestrians and all other traffic over the tracks of the said M. L. & T. R. R. & S. S. Co. at Newton Street in the said Fifth District of the City of New Orleans, popularly known as Algiers.

A decision in this case rests entirely upon the answers to the two questions which this case presents to this Commission.

Is a viaduct necessary in Algiers at Newton Street over the tracks and shop and switching yards of the M. L. & T. R. R. & S. S. Co., defendants herein? Is the first question and the second question is, If a viaduct is necessary at this point, who should the builder be?

The answers to these two all embracing questions in this case are to be found by a consideration, firstly, of the history of the present viaduct at Newton Street, which has been closed to traffic because it is in an universally admitted unsafe condition, secondly; in a study of the conditions which petitioners allege make a viaduct necessary at this point and lastly; in a study of the jurisprudence

of state and federal courts throughout the United States covering cases of this kind.

The History

Briefly, Algiers is that part of the City of New Orleans which lies on the west bank of the Mississippi River. It has a population of approximately 25,000 inhabitants. Directly above it on the Mississippi River is the City of Gretna, Louisiana, the parish seat of Jefferson Parish, which is well populated even up to the very line where Orleans Parish (Algiers) ends and Jefferson Parish begins. Gretna is the centre of a very extensive and valuable manufacturing district. There are a number of cotton oil, fertilizer, acid, molasses and syrup, soap and cleansing power and other plants located in the Gretna territory.

[fol. 252-b] The Algiers street car system which has one of its terminals at the U. S. Immigration Station, located below the M. L. & T. R. R. & S. S. Co. properties in the direction of the mouth of the Mississippi River, has its other terminal at Marrero, Louisiana, more than a mile above Gretna, traversing the very thickly developed Jefferson Parish industrial district just above referred to. This street car system used the present Newton Street viaduct up to the time it became so dangerous that traffic of every kind had to be suspended over it.

The Newton Street viaduct was built in 1907. It was made necessary at that time, and all parties admitted its necessity and admit its necessity now by the closing of every street from upper to lower Algiers for the benefit of the said M. L. & T. R. R. & S. S. Co. by the city authorities of the City of New Orleans. The price paid by the Railroad Company for this legal closing of every street, without exception, running through the railroad's property and paralleling the Mississippi River from the river to the woods over two miles was \$10,000,000.

All parties interested, the M. L. & T. R. R. & S. S. Co., the City of New Orleans and the Algiers Street Railway interests, thereafter agreed that Newton street was the logical Algiers highway to continue over the yards of the said M. L. & T. R. R. & S. S. Co. from upper to lower Algiers. It was then and is now the most direct highway from the central portion of Algiers to the largest and the important section of Algiers located below or east of the M. L. & T. R. R. & S. S. Co. tracks. Newton Street is 10 blocks from the river and parallel thereto.

When the Newton Street viaduct was built, the City of New Orleans contributed all but \$13,333.33 to its cost of over \$99,000.00 the M. L. & T. R. R. & S. S. Co. contributing, as far as known, nothing to its original construction. This, however, has naught but historical value in this particular proceeding and we will therefore, at this time spend no time going any further into the whys or wherefores of this phase of the first Newton Street viaduct.

For fifteen years this viaduct served the people of Algiers but also, and more especially, the M. L. & T. R. R. & S. S. Co., whose closing of all of the Algiers streets parallel to the Mississippi River

had made the viaduct necessary and then through wear and tear and for other reasons it failed and the Commission Council of the City of New Orleans ordered it closed. The principal cause of the deterioration of the steel structure of the Newton Street viaduct, as testified to, were the gasses which escaped from the locomotives of the defendant, M. L. & T. R. R. & S. S. Co. and that the largest portion by far of damage to be observed now in the said Newton Street viaduct is to be seen in that highest and longest most costly stretch of it which is directly above the yards of the M. L. & T. R. R. & S. S. Co., which like the Panama Canal Zone in Panama, divides Algiers completely in half, and as was testified to by at least three gentlemen, an Algiers banker and the Algiers real estate experts and developers, has tended to very seriously retard the greater and [fol. 252-c] natural development of that unfortunate part of Algiers which today depends upon one viaduct to cross these railroad yards in its whole width of almost two miles, and be it remembered that that only means of egress or ingress is located directly against the Mississippi River and a personal inspection made by Commissioner Williams, of this Patterson Street viaduct, did not give any grounds for any praise whatever of the quality of roadway facilities which this Patterson Street structure now provides.

The Necessity

And now we consider the second factor in this case, namely the conditions which petitioners allege make a viaduct at Newton Street a necessity.

If there were no people living below the M. L. & T. R. R. & S. S. Co. properties, there would still be many good reasons why a viaduct should be built over these yards and tracks, for the viaduct is not only a necessary convenience for the approximately 5,000 people who live below the railroad zone, but is also a necessary convenience to the almost 20,000 people who live above this zone and the many other thousands who live in Gretna and on the east bank of the river in the largest portion of New Orleans, who may have business to transact below this railroad property or who might, if there were sufficient street through or over these yards, be inclined to invest in and develop this extensive stretch of Orleans Parish, which at this time houses only a very small fraction of the large number of people who could comfortably inhabit this section.

But the factor of great potential development need not be wholly depended upon to prove the necessity, nor do we have to base our decision that a viaduct is necessary at Newton Street upon the idea which is inborn in all American citizens, that the development of any community should not be throttled by the selfishness of any individual or set of individuals in that community.

It was testified that approximately 5,000 people live below the M. L. & T. R. R. & S. S. Co. yards. The man who made this estimate, which was sworn to, was the General Manager of the Street Railway Company which operated over the Newton Street viaduct

into the territory below the said railroad yards. His Company furnished power and electric lights, its street cars carried passengers in and out of this territory, he was himself a frequent visitor to the entire section he testified about. As we said before, his entire testimony was taken under oath just like every other witness in this proceeding testified under oath. His peculiar position gave him a better opportunity than perhaps anyone else to keep a close tab upon the development of lower Algiers.

Surely those 5,000 people are entitled to have more than one way out to their 20,000 neighbors above the viaduct who too, are surely entitled to more than one way in to their 5,000 neighbors below the M. L. & T. R. R. & S. S. Co. zone.

[fol. 252d] With the Newton Street viaduct closed, real estate men who had sold hundreds of lots for home builders, and as many homes in lower Algiers, have stopped their development. The Patterson Street viaduct which requires an average detour of 25 to 30 additional blocks to reach the fellow directly opposite them on the upper side of the railroad yards, is not *a* held to realty development. Inspection by the Commission showed that Algiers needs such development, for Algiers, as Commissioner Williams noted on his several inspection trips above and below and over and under the Newton Street bridge, is congested for home building expansion above the yards and the natural trend is towards the section below the yards. Numerous new homes were to be seen throughout the entire territory below the railroad zone.

A traffic check made by the City Engineer's office of New Orleans in November, 1921, showed on one day from 7 A. M. to 7 P. M. pedestrians 783, street cars 139, automobiles 232, auto trucks 257 and single and double team wagons 219.

It was testified that the Oakdale sub-divisions, which is located farthest from the river of all of the developed lower Algiers residential sections, was 50 blocks away, when the Patterson Street viaduct had to be used, from points actually just a few blocks away by the streets which the M. L. & T. R. R. & S. S. Co. had closed.

If the Newton Street viaduct were in operation, this detour would be reduced 20 blocks.

A banker who is very conversant with land values in the district below the railroad zone, testified that because of the Newton Street viaduct, land values down there had trebled in the last ten years. With no viaduct at Newton Street, it is not hard to contemplate what a great loss will befall those who live below this closed traffic artery.

There are two United States Government reservations in that section; the United States Naval Station upon which is also located now a hospital for disabled World War Veterans who now number 200 and this is to be soon increased to 350 patients and in the conduct of which there is a civilian personnel of half a hundred doctors, specialists, clerical help and attendants; and also the United States Immigration Station about one-half mile farther down.

As this territory develops, there is the gravel question of fire hazard to be reckoned with. Only one way in, and that way the Patterson Street viaduct at the river end, which is sparsely settled,

is not the quickest way for fire fighting apparatus to reach a fire below the closed M. L. & T. R. R. N. & S. S. Co. yards in the thickly populated area down there around Newton Street. Representatives of the New Orleans Fire Department want the Newton Street viaduct repaired and reopened at once for the greater safety of the citizens and the property below the M. L. & T. shops.

[fol. 252e] The questions asked in this case by counsel for the M. L. & T. R. R. & S. S. Co. indicate beyond a doubt his own belief that a viaduct is necessary at Newton Street. The fact that he or his Company has not contended against the reconstruction and repair of this viaduct, but has taken the position that somebody else, and not they, should pay for this reconstruction, is to our mind an admission that there can be no quarrel over the fact that the present viaduct is unsafe and that it should be repaired because it is a necessity.

The record in this case is full of testimony establishing beyond a doubt the necessity of a Newton Street viaduct.

Who Should Build It

We will now proceed to a discussion of the law of this case around which the whole fight of the M. L. & T. R. R. & S. S. Co. centres in their effort to dodge their legal and equitable responsibility.

Who should build this necessary viaduct but the M. L. & T. R. R. & S. S. Co.? Equity and written law both place the burden of building it upon the defendant in this case.

Who made this viaduct necessary? The people did not, the electric street railway did not. The M. L. & T. R. R. & S. S. Co. did. When they closed every street between the river and the woods, that crossed their properties, the M. L. & T. R. R. & S. S. Co. created a condition of total separation between upper and lower Algiers and it was this separation that made the Newton Street viaduct so necessary a necessity.

For whose benefit were these many streets closed? For no one but the M. L. & T. R. R. & S. S. Co. The people did not need these streets closed. They would have preferred to have them remain open. But to show their spirit of cooperation with the L. M. & T. R. R. & S. S. Co. in their greater shop plans, the people were willing to have these streets closed for the safety of all concerned but for the convenience of only the M. L. & T. R. R. & S. S. Co.

Consider this, that the M. L. & T. R. R. & S. S. Co. saved at least \$5,000.00 a year in salaries of flagmen and upkeep of grade crossings by having this viaduct at Newton Street instead of a grade crossing. It would have cost them at least \$5,000.00 a year, excluding the many thousands of dollars in personal injury claims if Newton street had been open during these past fifteen years.

Reflect upon the further fact that the M. L. & T. R. R. & S. S. Co. did not, as far as obtainable record show, pay anything towards the cost of this viaduct at the time it was built or since, although the viaduct existed only because these streets were closed for the benefit of the M. L. & T. R. R. & S. S. Co.

Bear in mind that all it gave was \$10,000.00 for the closed streets. The City gave the streets, the \$86,000.00 it paid towards the construction of the viaduct that these closed streets caused to be erected and the thousands of dollars spent on the upkeep of this structure during the past 15 years by the City.

[fol. 252f] And then we do not forget that it was the gases from the locomotives of this same M. L. & T. R. R. & S. S. Co. that corroded the steel structure of this bridge.

It seems to us that the equity of this case is alone sufficient to require the defendant herein to build this viaduct. But we do not depend upon equity. The cold written law says they shall, and the same law says that the governmental body that can require them so to do, is the Louisiana Public Service Commission.

The M. L. & T. R. R. & S. S. Co. excepted to the jurisdiction of this Commission to determine this matter. This exception was overruled.

The Constitution of Louisiana of 1921, Section 4, Article 6 provides:

"The Commission (Louisiana Public Service Commission) shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads operated in this State".

This same Section 4 further provides:

"The Power, authority and duties of the Commission shall effect and include all matters and things connected with, concerning and growing out of the service to be given or rendered by the common carriers" under the supervision regulation and control of the Commission.

The Supreme Court of Louisiana interpreted this article in *G. C. & S. F. R. R. vs. Public Service Commission*, 151 La. August 5, 1922.

This Commission had ordered the G. C. & S. F. R. R. to build an overhead crossing in Beauregard Parish. This order was contested. The Commission won in the District Court. The Supreme Court affirmed the decision of the lower court and the overhead crossing was built.

The law books of this country literally overflow with cases similar to this one, and the duty of steam railroads to build viaducts or bridges over their yards or wherever else necessary is firmly established. It has been repeatedly held that it is a valid exercise of the police power for a steam railroad to be compelled to construct or repair a viaduct over its right of way.

In *Erie Railroad Company vs. Board of Public Utility Commission*, 254 U. S., page 394, the legality and propriety of such action as in this proceeding is very strongly approved and fixed.

Considering therefore, the proven necessity for a viaduct over the tracks of the M. L. & T. R. R. & S. S. Company at Newton Street in the Fifth District of the City of New Orleans (Algiers); and [fol. 252g] considering further that both the law and equity place

the burden of providing such a viaduct upon the steam railroad over those tracks this viaduct is to be built, the M. L. & T. R. R. & S. S. Co.,

It is

Ordered, That the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans (Algiers); the said viaduct herein ordered to commence at a point on Newton Street (Algiers) at a sufficient distance from the properties of the M. L. & T. R. R. & S. S. Co. to provide suitable and proper grades for traffic thereover; all to be in accordance with plans and specifications which are hereby required to be filed with this Commission for its approval within 30 days from the date of this order; and it is further

Ordered, That within 90 days from the date of the approval of the plans herein required to be filed by this Commission that the said M. L. & T. R. R. & S. S. Co. complete and open for traffic to the public the viaduct herein required.

By order of the Commission.

Baton Rouge, Louisiana, November 11, 1922.

Huey P. Long, Chairman. Francis Williams, Commissioner.
Henry Jastremski, Secretary. (Seal.)

Attest: A true copy. Henry Jastremski, Secretary.

[L. 253] NOTE.—Being Louisiana Public Service Commission Order No. 84, same as exhibit attached to the answer.

[L. 254] AFFIDAVIT OF HUEY P. LONG—Filed January 27, 1923

STATE OF LOUISIANA,

Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Huey P. Long, who, being by me first duly and legally sworn, says: that the volume of business before the Louisiana Public Service Commission has become so extensive that it is impossible for the entire Commission to actually participate in the making up of the record in each case and the assembling of the evidence therein; that for said reasons, being fully entitled under the law and constitution of the State of Louisiana, the Commission has adopted a system much like unto the systems adopted by the Interstate Commerce Commission and the courts of the several states and federal government, viz: to allow, under specific resolutions of the Commission, the Commissioner to preside at the hearing and to make up the

record of the case for the further examination by the Commission as a whole; that after said evidence is heard before a Commissioner thus empowered *and* same is transcribed by the official reporter for the Louisiana Public Service Commission and the individual Commissioners supplied with a record for examination; that it is solely in the interest of the speedy advancement of the Commission's business that such method of procedure is adopted, the mode of procedure being particularly essential when applications are made for adjustments of advances in rates which consume detailed examinations lasting over a number of days and all of which can be as well and as properly decided by Commissioners from a review of the record as if they had been present and personally heard the case; that whenever the Commission has anything to doubt with regard to a case heard before one Commissioner, it has been its custom to set the case down, either for the purpose of additional evidence or for argument before the Commission as a whole.

(Signed) Huey P. Long.

Sworn to and subscribed before me on this the 23rd day of January, 1923. (Signed) N. B. Williams, Notary Public. (Seal.)

[fol. 255] AFFIDAVIT OF SHELBY TAYLOR—Filed January 27, 1923

STATE OF LOUISIANA.

Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared Shelby Taylor, who, being first duly sworn, deposed and said:

That he is a member of the Louisiana Public Service Commission and has been continuously a member thereof since the organization of the said Commission on July 1st, 1921; that he did not attend the hearings at which the testimony was taken in the case entitled "Residents of the Fifth District of New Orleans vs. Morgan's Louisiana and Texas Railroad and Steamship Company," in the matter of Newton Street viaduct, Algiers, which hearings were held before Commissioner Francis Williams in the City of New Orleans; that after the hearings were closed he was furnished with a copy of the record made in the said case, including a transcript of the oral testimony taken before the Commission's official stenographer; that he read and duly considered the same; that thereafter, on the 24th day of November, 1922, he attended a session of the Louisiana Public Service Commission held in the City of New Orleans, Louisiana, and, together with Commissioner Williams, heard argument of counsel for the Morgan's Louisiana and Texas Railroad and Steamship Company, for the Louisiana Public Service Commission, for the South New Orleans Light and Traction Company, and for the residents of the Fifth District of New Orleans, on the application of the Morgan's Louisiana and Texas Railroad and Steamship Company to be heard in oral argument; that thereafter the said case was duly considered by him, and that after duly considering the evidence and the argument of

counsel on December 1st, 1922, he affixed his signature to Order No. 84, of the Louisiana Public Service Commission, requiring the Morgan's Louisiana and Texas Railroad and Steamship Company to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans, and to submit plans to the Commission for the same within thirty (30) days from November 11th, 1922, as will be shown by the said order.

(Signed) Shelby Taylor.

Sworn to and subscribed, before me, a Notary Public in and for the Parish of East Baton Rouge, this, the 25th day of January, 1923, A. D. (Signed) W. G. Randolph, Notary Public. My commission expires indefinite.

fol. 256] U. S. DISTRICT COURT, EASTERN DIST. OF LOUISIANA,
BATON ROUGE DIVISION

No. 114

[Title omitted]

OPINION OF THE COURT—Filed February 15th, 1923

before Bryan and King, Circuit Judges, and Foster, District Judge

Henry H. Chaffe (Denegre, Leovy & Chaffe), for plaintiff.
Wiley M. Barrow, Asst. Attorney General, for defendant.

OSTER, D. J.:

This is an application by the Morgan's Louisiana and Texas Railroad and Steamship Company, hereinafter called the Railroad pursuant to the provisions of Sec. 266, J. C., for an interlocutory injunction to prevent the enforcement of an order of the Public Service Commission of Louisiana, hereinafter called the Commission, the material part of which is as follows:

"Ordered, That the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required to provide a safe and suitable traffic viaduct over — across its tracks, facilities and properties in the Fifth District of New Orleans, (Albion) at a sufficient distance from the properties of the M. L. & T. R. & S. S. Co. to provide suitable and proper grades for traffic to cross over;"

The bill alleges that the above order is illegal, unconstitutional and unreasonable on various grounds and challenges the jurisdiction and authority of the Commission in the premises. The bill is

lengthly and alleges the material facts hereafter referred to and it is unnecessary to more fully state it. The question of the jurisdiction of the Commission must be considered first.

The facts material to a decision in this case are these: The plaintiff for forty years has owned in fee simple, and has had in its possession, a strip of land in the city of New Orleans, in the 5th District, known as Algiers, measuring 325 feet front on the Mississippi River by 24 arpents in depth, approximately 3,600 feet. This strip and adjacent land subsequently acquired is fenced and is occupied as a railroad yard, contains some 20 odd tracks, round houses and machine shops. No streets have ever been opened across the property, the streets at right angles on both sides stopping at the fence. Crossing the property at Patterson Street, just back of the levee of the Mississippi River, is a viaduct for vehicular and foot passage. Au-[fol. 257] other viaduct, for foot passage only, crosses the property at Eliza Street, the third street back from the river. Five streets still further back, at Newton Street, another viaduct crosses the property. These are the only rights of way that have ever been granted the public. The Newton Street viaduct is about 2,000 feet long and occupies a portion of Newton Street on each side of plaintiff's property. It was constructed in 1907 pursuant to an agreement, incorporated in various ordinances, between the plaintiff, the City of New Orleans, and the Algiers Railway and Lighting Co., a corporation operating a street car system in Algiers and over the viaduct. The contract and its subsequent modifications provide for the payment by the City of the cost of erecting the viaduct and for the maintenance of same thereafter by the Street Railway Co. At the present time the viaduct is much in need of repair and while passable for pedestrians, is not sufficiently strong to permit the operation of street cars over its entire length. The order sought to be enjoined relates to this viaduct.

The Commission was created by Art. 6, sections 3, 4, 5, 6, 7, and 9 of the Constitution of 1921. Sec. 4 is material to the issues in this case, the pertinent part is as follows:

"The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads in the State of Louisiana, and to fix reasonable and just single and joint rates, fares, tolls or charges for the commodities furnished or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning and growing out of the service to be given or rendered by the common carriers."

The only case in which the Supreme Court of Louisiana has had occasion to pass upon the above quoted provision of the Constitution of 1921 is that of *Gulf C. & S. F. Ry. Co. vs. La. Pub. Service Com.* 151 La. Rep. 635. In that case the authority of the Commission to order a railroad to construct an overhead crossing over a public road was questioned. The Court held the order to be valid and said:

[fol. 258] "To hold that the words 'supervise, govern, regulate, and control' refer only to the relations existing between railroads on one side, and shippers and passengers on the other, as we understand plaintiff's contention to be, would in our opinion restrict the power and authority of the Commission within unreasonable limits, and affect its efficiency to an extent never intended by the Constitution."

The Commission relies on the above decision as settling the question of its authority, to make the order herein complained of, in its favor. An examination of the case discloses, however, that the Supreme Court did not rest its decision wholly on the provisions of the Constitution of 1921. Act 132 of 1918, relating to the powers of the Railroad Commission, kept in force and made applicable to the Commission by the Constitution of 1921, provides that the Railroad Commission shall have the power, on a certificate from the Police Jury of the Parish that a railroad refuses so to do, to order any railroad crossing a public road to construct and maintain a suitable and convenient crossing, in accordance with standard specifications of the State Highway Department of the Board of State Engineers. In the said case the specifications had been furnished, the railroad had refused to construct and the Police Jury had petitioned the Commission for the order. It is significant that the Supreme Court also said:

"Nor do we believe that the act of 1918 and the order adopted by the Commission by virtue of said act on June 1, 1921, in regard to the public crossing over the tracks of plaintiff, is an attempt to exercise control or regulation of public highways by the Commission."

The Railroad Commission, predecessor of defendant, deriving its powers from the Constitution of Louisiana (See Art. 284, Const. 1913) had authority "to govern and regulate railroads" "to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations and to inspect railroads and require them to keep their tracks and bridges in a safe condition."

There is no appreciable difference in the authority of the two commissions yet the legislature thought it necessary to adopt Act 132 of 1918. Apparently the Railroad Commission never tried to exercise the authority herein attempted. At least, no order of the Railroad Commission nor any decision of a court has been cited. [fol. 259] And yet its powers had been as broadly construed as in the above case.

Act 132 of 1918 has no application to the City of New Orleans. We do not consider the above case controlling and are therefore at liberty to construe the law for ourselves.

Analysing the order complained of in this case it is apparent the Commission is seeking to exercise control over the streets of New Orleans, as well as the power of Eminent Domain. Conceding that the police power can never be contracted away and that a railroad may be required to construct a crossing over a street or public road,

at its own expense, these principles do not apply to the taking of the private property of a railroad for public use. It is true there is a viaduct already in existence, and the railroad has granted a right of way to the public over its property, but it has done so under certain conditions amounting to a contract. To change those conditions now would abrogate the whole contract and restore conditions as they were before. The public could not hold on to the right of passage over the railroad's property without compensation and repudiate the obligations they assumed and in consideration of which the right of way was granted. *Atchison T. & S. Ry. Co. vs. Shawnee*, 183 F. 85 V. S. & P. Ry. Co. vs. Monroe 48 La. An. 1102.

Before the railroad could be required to build a viaduct as ordered, Newton Street would have to be opened across the railroad property. This would require expropriation proceedings instituted by the proper authorities before a competent tribunal.

Furthermore, the order requires the use of Newton Street and the building of a structure, with consequent blocking of that street. This certainly is a regulation of the street and the regulation of its grades.

The general rule regarding municipal corporations is that they have control of their own streets with the right to fix grades, provide for pavement, regulate their use by steam and street railroads, and determine what structures in the nature of railroad tracks and appurtenances, telegraph poles, etc., may be erected and maintained on said streets. This is one of the ordinary governmental functions [fol. 269] of a municipal corporation, exercised by virtue of the Police Powers delegated by the State. There is no doubt that the City of New Orleans Possesses this power to the fullest extent. The present charter of New Orleans was granted by the Legislature by Act 159 of 1912. By it a commission form of government was created, to be administered by five commissioners elected by the people. Sec. 1 of said act, pars. D, E. & F. provide as follows:

"The legislative, executive and judicial powers of the City shall extend to all matters of local and municipal government, it being the intent thereof, that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed:

"The city shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city;

"All powers of the city shall, except as otherwise provided in this charter, be vested in its elective officers, subject to distribution and delegation of such powers as provided in this charter or by ordinance."

Supplementing this, in enumerating the powers and duties of the Mayor and Commission Council, the Act further provides:

"Sec. 6. The Commission Council shall have the power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution as may be necessary and proper;

3. To open and keep open and free from obstruction all streets.

Sec. 8. The Commission Council shall also have power:

1. "To order the ditching, filling, opening, widening and paving of the public streets, and to regulate the grade thereof, and by a two thirds vote, to sell or change the destination of any street or property which is no longer necessary for the public use to which it was originally destined.

12. To authorize the use of the streets for railroads operated by horse, electricity, steam or motive power, and to regulate the same and compel all such companies to keep in repair the street bridges and crossings through or over which their cars run."

Sec. 22 of Art. 14, of the Constitution of 1921 provides:

"The electors of the City of New Orleans shall have the right to choose their public officers." This section shall not prohibit the Legislature from appointing or authorizing the appointment of any board or commission with full authority in the City of New Orleans other than that of controlling the ordinary governmental functions of municipal government.

[fol. 261] The above special provisions of the city charter were re-enacted practically verbatim by Act 93 of the Extra Session of 1921, held after the adoption of the Constitution of 1921.

The briefest consideration makes apparent the conflict of authority created by the order in this case. If the Public Service Commission has the right to order the erection of a viaduct on the streets of the City of New Orleans, it would have the right to demolish a viaduct already in existence and institute in lieu thereof a grade crossing. It would have the authority and jurisdiction to grant a right of way through the streets of the city. It might give permission to a railroad to run its trains, say down St. Charles Avenue and through the heart of the business district, or it might order the replacement of the railroad tracks on St. Joseph Street. The reasonableness of such orders would not affect the jurisdiction to make them as every order of the Commission must be measured by that standard.

The whole trend of the law of Louisiana, whether created by the Constitution or by act of the Legislature, is to set the City of New Orleans apart from the balance of the state in matters affecting its municipal government. It is significant that the Legislature has given her the specific power to authorize the use of streets for railroads operated by steam, and to regulate them and compel them to keep street bridges and crossings in repair. This both by the charter of 1912 and the latest act of 1921, above referred to. It cannot be said at this day that the Legislature had reference to street cars operated by steam. It is significant that while the Commission is given the power to regulate street railroads, elsewhere in the state they can have no such power in New Orleans, except by the vote of her people. This is the plain construction of Sec. 7 of Art. 6 of the

Constitution of 1921, the provisions of which are unnecessary to quote in full. It is significant that the Legislature, while having the right to create other boards to exercise authority in New Orleans, such as the Dock Board, can create no commission to exercise the ordinary functions and municipal government. Sec. 22 of Art 14, Const. 1921, quoted above.

[fol. 262] It is suggested in argument that the order should be construed as requiring the railroad to repair the existing viaduct and not to build a new one. The order is not susceptible of such construction on its face and could only be given that meaning by the grace of the Commission. Orders of this kind should be plain and specific and require no construction, and certainly in no event should they be construed by reference to the mental attitude of the authority making them. But the principle governing is the same. It is in evidence that to build a new viaduct would cost approximately \$150,000 and to repair the present one would cost about \$51,000. In either event existing contracts would be abrogated.

If the jurisdiction of the Commission to enter the order herein in controversy could be sustained the right of the citizens of New Orleans to govern themselves in purely local matters would be seriously impaired. We can deduce no such intention from the provisions of the Constitution of 1921 or any other law of Louisiana. It follows that the commission was without jurisdiction or authority to make the order complained of.

The point is made in the answer that the order sought to be enjoined is not the final order of the Commission. The order complained of was entered November 11, 1922, and is numbered 82. Thereafter the Commission denied a rehearing, on December 1, 1922, and ratified, affirmed and readopted its order No. 82 setting it out verbatim in the order overruling the application for a rehearing but giving this proceeding the number 84. This is a pure technicality. It is plain there is but one order *the* given different numbers at different times but if there be any distinction the prayer for general relief will warrant the order of this Court including both numbers.

Entertaining these views it is unnecessary to consider the other questions presented by the pleadings. An interlocutory injunction will issue as prayed for.

[fol. 263] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

No. 114

[Title omitted]

DECREE GRANTING INTERLOCUTORY INJUNCTION PENDENTE LITE—
Filed February 15, 1923

This cause came on to be heard at a former day upon the application of the complainant for an interlocutory injunction pendente

lite herein, and after hearing the evidence offered on behalf of the respective parties and arguments of counsel, the matter was submitted, when the Court took time to consider:

Whereupon, and on due consideration thereof, and for the written reasons of the Court on file, it is ordered, adjudged and decreed that an interlocutory injunction pendente lite issue enjoining and restraining the defendants herein from enforcing, or attempting to enforce, or causing to be enforced, or attempted to be enforced, any of the terms, provisions or requirements of Orders Nos. 82 and 84 of the Louisiana Public Service Commission, until the further orders of the Court.

It is further ordered, adjudged and decreed that the complainant shall within one week from this date give bond and security in the sum of ten thousand (\$10,000.00) dollars to be approved by the Clerk of this Court, conditioned upon the payment of such costs and damages as the defendants may or shall have suffered if wrongfully enjoined or restrained by this interlocutory order.

(Signed) N. P. Bryan, United States Circuit Judge; Alex C. King, United States Circuit Judge; Rufus E. Foster, United States District Judge. New Orleans, La., February 15, 1923.

[fol. 264] UNITED STATES OF AMERICA:

BOND ON INJUNCTION FOR \$10,000—Omitted in printing

[fol. 265] Injunction Issued March 12, 1923—Filed March 15, 1923

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF
LOUISIANA

[Title omitted]

WRIT OF INJUNCTION

The President of the United States of America to Louisiana Public Service Commission and Huey P. Long, Shelby Taylor, & Francis Williams, individually and as members thereof, Greeting:

Whereas, it has been represented unto us in our said District Court on the part of Morgan's La. & Tex. R. R. & S. S. Co. in a bill of complaint lately exhibited against you and others touching certain matters and things therein set forth.

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Louisiana Public Service Commission your agents, attorneys, and servants and each of you,

are hereby commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from enforcing, or attempting to enforce, or causing to be enforced, or attempted to be enforced any of the terms, provisions or requirements of Orders Nos. 82 and 84 of the Louisiana Public Service Commission, and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness, the Honorable Rufus E. Foster, Judge of said Court, at the City of New Orleans, this 12th day of March in the year of our Lord, 1923.

(Signed) H. J. Carter, Clerk. (Seal.)

Clerk's office. A true copy. (Signed) H. J. Carter, Clerk. New Orleans, La., Mar. 12, 1923.

Received by U. S. Marshal, New Orleans, La., Mch. 13/23, and on the 14th day of the same month and year I served the original of which this writ is a certified copy on the Louisiana Public Service Commission by leaving same at the office of said Commission in Baton Rouge, Louisiana in the hands of the Secty. thereof Mr. Henry Jastremski, who informed me that there was at that time no member of said Commission in Baton Rouge.

Victor Loisel, U. S. Marshal, By H. C. Moseley, Deputy U. S. Marshal.

NOTE.—The injunction issued to Huey P. Long, Shelby Taylor and Francis Williams, members of the Louisiana Public Service Commission, are the same as the injunction issued to the Commission.

[fol. 266] Supplemental & Amendatory Bill of Complaint & Order—
Filed April 13, 1923

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT
OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

SUPPLEMENTAL AND AMENDATORY BILL OF COMPLAINT—Filed
April 13, 1923

To the Honorable the District Court of the United States in and
for the Eastern District of Louisiana, Baton Rouge Division:

The plaintiff, the Morgan's Louisiana & Texas Railroad & Steamship Company, domiciled in the City of New Orleans, State of Louisiana, presents this its supplemental and amendatory bill of complaint against the defendants the Louisiana Public Service Com-

mission and against Huey P. Long, Shelby Taylor and Francis Williams as members of said Commission and Adolph V. Coco, Attorney General of the State of Louisiana and Wylie M. Barrow, Assistant Attorney General, attorneys for said Commission and alleges as follows:

I. Petitioner re-avers and alleges each and every of the allegations contained in its original bill of complaint the same as if set forth herein in full.

II. That heretofore in this proceeding to-wit, on the 15th, day of February, 1923, this Honorable Court did render a decree enjoining and restraining the defendants from enforcing or attempting to enforce the order complained of in the original petition on file herein.

That writs of injunction issued in accordance with said decree and directed to the Louisiana Public Service Commission, Francis Williams individually and as a member of the Louisiana Public Service Commission, Shelby Taylor, individually and as a member of the Louisiana Public Service Commission, and Huey P. Long individually and as a member of the Louisiana Public Service Commission were served upon said parties respectively.

[fol. 267] III. That thereafter and in spite thereof said Louisiana Public Service Commission reopened said proceedings before said Commission and did on the 29th, day of March 1923, render an order in the following words, to-wit:

"Ordered that within fifteen days from the date of this order the Morgan's Louisiana & Texas Railroad & Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans, known as the Algiers within the limites of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition.

This order shall become effective at once.

All orders in conflict herewith are cancelled, rescinded and annulled."

IV. That thereafter and within the time prescribed by the rules of said Commission petitioner applied to said Commission for a new trial and a rescinding of said order rendered on March 29, 1923, and on April 5th, 1923, said application for a new trial was denied.

V. That the cost to repair that portion of the Newton Street viaduct within the limits of petitioner's property would exceed the sum of Forty nine thousand (\$49,000.00) Dollars and the cost to repair the entire viaduct will exceed the sum of Seventy one thousand (\$71,000.00) Dollars.

VI. That the order rendered by said Commission on March 29, 1923, and herein complained of is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for the reasons set forth in the original bill of complaint herein filed and also for the following reasons:

(a) Said order deprives petitioner of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Section Two of Article One of the Constitution of the State of Louisiana adopted in the year 1921, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor.

(b) Said order denies to petitioner the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and if the said Constitution and laws, either or both, provide to the contrary, then same are unconstitutional, null and void being in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as aforesaid.

(c) Said order impairs and renders null and void and of no effect the obligations of the City of New Orleans under the contract above mentioned existing between the City of New Orleans and petitioner under which said City acquired the right to cross petitioner's said tract of land in violation of Section Ten of Article One of the Constitution of the United States.

(d) Said Commission in rendering said order claims to be acting within the scope of authority and jurisdiction of Section Three of Article Six of the Constitution of the State of Louisiana adopted in the year 1921, whereas neither the provisions thereof nor any other law of the State of Louisiana confers upon said Commission the power, authority or jurisdiction to render such an order as the one herein complained of and said Commission was and is without power, authority or jurisdiction to render the order complained of.

(e) Said order requires that use be made of part of the public streets of the City of New Orleans and attempts to regulate the same and control the use thereof and said order attempts to make part of the public streets of the City of New Orleans that portion of said viaduct referred to in said order and to control the character, use and maintenance thereof and regulate the same, jurisdiction over which and jurisdiction to do which is vested exclusively in said City of New Orleans, and said Commission is without power, jurisdiction or authority so to do.

(f) Said order releases and extinguishes the obligations of the South New Orleans Light & Traction Company to the City of New Orleans to maintain in all its parts the viaduct constructed by said City of New Orleans as aforesaid and places upon petitioner the burden of maintenance aforesaid in violation of the provisions of Section Thirteen of Article Four of the Constitution of the State of [fol. 269] Louisiana adopted in the year 1921, and the aforesaid provisions of the amendments to the Constitution of the United States.

(g) Said order is unjust, arbitrary and unreasonable and there is no public necessity therefor, and constitutes an unreasonable interference with and burden upon interstate and foreign commerce contrary to Section Eight of the Constitution of the United States giving to the Congress of the United States power to regulate commerce with various nations and among the several states, and the provisions of the Transportation Act of 1920, enacted under the authority thereof as well as in violation of the Fourteenth Amendment to said Constitution in that it deprives petitioner of its property without due process of law.

(h) Said order constitutes the taking of petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company without compensation to petitioner in violation of the Fourteenth Amendment to the Constitution of the United States and Section Two of Article One of the Constitution of the State of Louisiana, in that it deprives petitioner of its property without due process of law and denies to petitioner the equal protection of the law in that under the laws of the State of Louisiana the South New Orleans Light & Traction Company before acquiring or obtaining any right to cross petitioner's property other than that required by the franchise under which it is operating as aforesaid has the right to and is obligated and required to expropriate the right to do and to pay to petitioner in advance of the taking or requiring thereof a just and adequate compensation therefor.

VII. That petitioner has not complied with said order of said Commission and unless restrained by order of this Honorable Court, said Commission will, after the lapse of fifteen days from March 9, 1923, proceed to fine petitioner for failure so to do a sum of not less than One Hundred (\$100.00) Dollars and not more than five thousand (\$5,000.00) Dollars.

VIII. That the imposition of fines and penalties upon petitioner for not obeying said order would be contrary to the Constitution of Louisiana and to the Fourteenth Amendment to the Constitution of the United States for the reasons set forth in the original bill of complaint filed herein.

[fol. 270] X. Petitioner shows that by said orders of said Commission and the provisions of the Constitution of the State of Louisiana petitioner is threatened by defendants that they will prosecute petitioner for the failure on the part of petitioner to comply with the

order herein complained of and may bring suits against petitioner its agents and servants for the collection of excessive penalties provided for in the Constitution of Louisiana and will thereby endeavor to coerce and compel petitioner to comply with said order rendered on March 29th, 1923, and will subject petitioner to multitudinous and vexatious suits and that all of said attempts, threats, vexations, and coercions will be carried out by defendants unless restrained by this Honorable Court.

X. Petitioner further shows that for the reasons hereinabove set forth immediate and irreparable loss will result to petitioner unless the restraining order herein prayed for be granted before the matter can be heard on notice and that petitioner is without adequate remedy at law.

XI. This is a controversy between citizens of the same State arising under the Constitution and laws of the United States and the amount in controversy is in excess of Five Thousand (\$5,000.00) Dollars.

Wherefore, petitioner prays, as petitioner is without adequate remedy at law,

(1) That the relief prayed for in the original bill of complaint herein be granted.

(2) That the order rendered by the Louisiana Public Service Commission on March 29, 1923, hereinabove complained of be declared null and void and be set aside and annulled.

(3) That defendants and each of them, their successors in office their servants employees, agents and other parties acting under the control or authority of each and all of said defendants be enjoined from commencing any suit or proceeding or in any other manner attempting to enforce the provisions of the aforesaid order rendered by said Commission on March 29, 1923, and from enforcing or taking any steps to enforce compliance by petitioner with said order and from taking any steps whatever to collect any penalties for failure on the part of petitioner to comply with said order and any and all other parties be enjoined from proceeding against petitioner under said order.

[fol. 271] (4) That pending the issue of a temporary injunction herein this Honorable Court may grant an interlocutory injunction restraining the said defendants, their agents, servants and employees and each of them from doing any of the above mentioned acts until the final hearing and order of this Honorable Court and that before the hearing and determination of petitioner's application for an interlocutory injunction this Honorable Court may forthwith grant a temporary restraining order restraining the said defendants, their agents, servants, and employees and each of them from doing any of the above mentioned things until the hearing and determination of the hearing for an interlocutory injunction herein.

Petitioner prays not only for a writ of injunction to conform to

the above prayer but also that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, the Louisiana Public Service Commission, Huey P. Long, Shelby Taylor and Francis Williams, individually and as members of said Louisiana Public Service Commission and Adolph V. Coco, at Attorney General of Louisiana and Wylie M. Barrow as Assistant Attorney General and attorney for the Louisiana Public Service Commission thereby commanding them and each of them on a day certain therein to be named, to be and appear before this Honorable Court then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises and to perform and abide by such order, direction and decree as may be meet in the premises, and that on final hearing hereof said order and injunction may be made perpetual and that the order of the Louisiana Public Service Commission rendered on March 29, 1923, be set aside and annulled and for such further relief as to your Honor May seem meet and petitioner will ever pray.

Petitioner further prays leave to file this its supplemental and amendatory bill of complaint herein.

(Signed) Denegre, Leovy & Chaffe, Attorneys for Petitioner.

[fol. 272] Affidavit of R. C. Watkins to above paper omitted in printing.

Let this supplemental and amendatory bill of complaint be filed.
(Signed) Rufus E. Foster, Judge. April 13, '23.

[fol. 273] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

TEMPORARY RESTRAINING ORDER—Filed April 13, 1923

[Title omitted]

The application of petitioner for a temporary restraining order having come on to be heard and determined this 13th day of April, 1923, by Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, and on having been made to appear that immediate and irreparable damage and loss will result to petitioner before the matter can be heard on notice unless this restraining order is granted.

Now therefore, upon the filing of a bond in this cause by petitioner of the sum of Ten Thousand (\$10,000.00) Dollars, which bond is filed herewith and is now approved,

It is ordered that defendants, Louisiana Public Service Commission, and Huey P. Long, Shelby Taylor and Francis Williams as members of and constituting Louisiana Public Service Commission, Adolph V. Coco, Attorney General of the State of Louisiana, and Wylie M. Barrow, Assistant Attorney General of the State of Louisi-

ana, and attorney for said Louisiana Public Service Commission, and each of them, their successors in office and their servants, employees, agents and all persons acting under the control or authority of any and all of said defendants absolutely desist and refrain from commencing any suits or proceedings to enforce or attempt to enforce the provisions of the order rendered by the Louisiana Public Service Commission on March 29, 1923, in which said Commission ordered petitioner, Morgan's Louisiana & Texas Railroad & Steamship Company to repair and thereafter maintain that portion of the Newton Street Viaduct between the side line of petitioner's property in the Fifth District of the City of New Orleans and from imposing any fine or penalty against petitioner, Morgan's Louisiana & Texas Railroad & Steamship Company for its failure to comply with said order and from instituting any suits or proceedings against petitioner, its agents or servants seeking to collect any fines, forfeitures or penalties from and against petitioner on account of petitioner having failed to comply with said order until the final hearing of this cause or further order of this Court.

It is further ordered that said defendants and each of them show cause if any they have on the date to be hereafter fixed in the District Court of the United States for the Eastern District of Louisiana why the prayer of said bill of complaint for a preliminary injunction should not be granted.

(Signed) Rufus E. Foster, Judge. April 13, '23.

[fol. 274] Answer to Supplemental and Amended Bill of Complaint—Filed May 11, 1923

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT
OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

ANSWER TO THE SUPPLEMENTAL AND AMENDATORY BILL OF
COMPLAINT

Now come the defendants, namely, Louisiana Public Service Commission, Huey P. Long, Shelby Taylor, and Francis Williams, members thereof; Adolphe V. Coco, Attorney General of Louisiana, and Wylie M. Barrow, Assistant Attorney General, and answering the supplemental and amendatory bill of complaint in so far as they are advised it is necessary to answer the same, say:

I. Defendants re-aver and adopt and allege each and every denial, admission and allegation contained in its answer to the original bill of complaint the same as if set forth herein in full.

II. Defendants admit that on the 15th day of February, 1923, this Honorable Court did render a decree enjoining and restraining the defendants from enforcing or attempting to enforce the order

complained of in the original petition on file herein; and that writs of injunction were issued as set out in paragraph two of Article II of the supplemental and amendatory bill.

III. Defendants admit that the proceedings before the Louisiana Public Service Commission were re-opened, and allege that after further hearing held on the 29th day of March, 1923, in the City of Baton Rouge, Louisiana, the said Commission rendered its order No. 117 referred to in Article III of the bill, a certified copy of which *of which* is hereto attached and made part hereof as fully as if written in full herein.

IV. Defendants admit that application for rehearing on the said [fol. 275] order was filed with the Commission and the said application was denied.

V. Defendants deny that the cost to repair that portion of the Newton Street viaduct will exceed the sum of Forty Nine Thousand (\$49,000.00) Dollars, and as to the cost of repairing the entire viaduct exceeding the sum of Seventy One Thousand (\$71,000.00) Dollars, defendants are not informed, and demand strict proof thereof.

VI. Defendants deny that the said order of March 29, 1923, is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for any of the reasons set forth in the original bill of complaint, or in the supplemental and amendatory bill of complaint; and, especially answering Article VI of said supplemental and amendatory bill, specially say:

(a) They deny that said order deprives petitioner of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of Section 2, Article I of the Constitution of the State of Louisiana adopted in the year 1921, in that it requires petitioner to devote its private property for public purposes without any compensation therefor.

(b) They deny that said order denies to petitioner the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that *in* requires petitioner to devote its private property to public purposes without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana, petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and they deny further that the said Constitution and laws of Louisiana are in any sense unconstitutional, null and void, as being in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

[fol. 276] (c) They admit that the said order renders null and void and of no effect the obligations of the City of New Orleans under an alleged contract mentioned as existing between the City of New Orleans and petitioner under which the said city acquired the

right to cross petitioner's said tract of land; but they deny that the said contract is binding upon the State of Louisiana or the Louisiana Public Service Commission; but, on the contrary, they aver that said contract is ultra vires and cannot be used to successfully abridge or destroy the police power of the state.

(d) They admit that in rendering said order the defendant Louisiana Public Service Commission claims to be and is acting within the scope of the authority and jurisdiction of Section 3, Article VI of the Constitution of the State of Louisiana of 1921, and deny that neither the provisions thereof nor any other law of the State of Louisiana confers upon the said Commission the power, authority or jurisdiction to render such an order as the one herein complained of, and that said Commission was and is without power, authority, or jurisdiction to render the said order.

(e) They deny that the said order attempts to regulate and control the use of the streets of the City of New Orleans, and further deny that that portion of the said viaduct referred to in said order over, above and across the properties of petitioner where said viaduct is ordered to be repaired, is exclusively within the jurisdiction of the City of New Orleans and that the said Commission is without power, jurisdiction or authority to order the maintenance thereof.

(f) They deny that said order releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans to maintain in all of its parts, the said viaduct alleged to have been constructed by the said City of New Orleans, but admit that the said order places upon petitioner the burden of maintaining the same, which defendants deny is in violation of Section 13, Article IV of the Constitution of the State of Louisiana of 1921, and the aforesaid provisions of the amendments to the Constitution of the United States.

[fol. 277] (g) They deny that said order is unjust, arbitrary and unreasonable, and that there is no public necessity therefor and constitutes an unreasonable interference with and burden upon interstate and foreign commerce contrary to Section 8 of the Constitution of the United States, giving to the Congress of the United States power to regulate commerce among the various nations and among the several states, and the provisions of the Transportation Act of 1920, as well as that said order is in violation of the Fourteenth Amendment to said Constitution in that it deprives petitioner of its property without due process of law.

(h) They deny that said order constitutes the taking of petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company without compensation to petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States and section 2, Article I of the Constitution of the State of Louisiana, in that it deprives petitioner of its property without due process of law and denies to petitioner the equal protection of the law in that under the laws of the State of Louisiana

the South New Orleans Light & Traction Company before requiring or obtaining any right to cross petitioner's property other than that acquired by the franchise under which it operates, as aforesaid, has the right to and is obliged and required to expropriate the right so to do and to pay petitioner in advance for the taking or acquiring thereof, a just and adequate compensation therefor.

VII. Defendants admit that the failure of plaintiff to comply with the said order of the said Commission subjects it to a penalty of from One Hundred (\$100.00) Dollars to not more than Five Thousand (\$5,000.00) Dollars, in accordance with the Constitution and laws of the State of Louisiana.

[fol. 278] VIII. Defendants deny that the imposition of fines and penalties upon petitioner for not obeying said order would be contrary to the Constitution of Louisiana and to the Fourteenth Amendment to the Constitution of the United States for any of the reasons set forth in the original bill filed herein.

IX. Defendants deny that there is any threat contained in the said order of said Commission, threatening petitioner that they will prosecute petitioner for its failure to comply with the said order complained of, but admit that should the petitioner violate the said valid order of the said Commission it will be subject to penalties as provided by the Constitution and laws of the State of Louisiana to be fixed by the Commission and to be sued for by the State of Louisiana in a court of competent jurisdiction at the domicile of the Commission, in which said suit, if brought for the violation of the said valid order of the Commission, the petitioner will have all and full opportunity to present every legal defense against the collection of the said fine.

X. Defendants deny that for any of the reasons set forth in the supplemental and amendatory bill of complaint petitioner will suffer immediate and irreparable loss, and that a restraining order was necessary in the premises, and they deny that a temporary injunction is necessary or equitable.

XI. Defendants admit that this is a controversy arising between citizens of the same state, but deny that it arises under the Constitution and laws of the United States. They admit that the amount in controversy is in excess of Five Thousand (\$5,000.00) Dollars, but they deny that this Honorable Court has jurisdiction over such a controversy, and on the contrary, allege that this Court is without jurisdiction, power and authority to issue either a temporary or final injunction as prayed for in the supplemental and amendatory bill of complaint and in the original bill of complaint.

[fol. 279] Wherefore, defendants having fully answered the original and the supplemental and amendatory bill of complaint, pray that the Court deny the temporary injunction and the final injunction prayed for; that the order contested herein be declared legal, and valid, and binding upon and enforceable against petitioner; that all

of petitioner's further demands be denied, and that defendants hence dismissed, with costs, and for all general and equitable relief in the premises.

(Signed) W. M. Barrow, Asst. Attorney General

Affidavit of Francis Williams to above paper omitted in printing

[fol. 280] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PAUL MALONEY—Filed May 14, 1922

STATE OF LOUISIANA,

Parish of Orleans:

Personally came and appeared before me, Paul Maloney, who upon being by me first duly sworn, did depose and say:

I am a member of the Commission Council of the City of New Orleans and have been since December, 1920. My official title is Commissioner of Public Utilities.

My attention has been called to the opinion and order dated March 29, 1923, rendered by the Louisiana Public Service Commission in case No. 165 Re-opened, entitled Residents of the Fifth Municipal District of the City of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company; the Order being numbered 117, in which opinion it is stated the Commission understands that the City of New Orleans has agreed to repair or to have kept in repair the Newton Street Viaduct except that portion thereof which extends over the property belonging to the Morgan's Louisiana & Texas Railroad & Steamship Company.

The fact is that the Commission Council of the City of New Orleans now has and for many months has had under consideration the matter of an adjustment of the legal situation with reference to the repair of the Newton Street Viaduct, but said Commission Council has not since December, 1920, agreed to repair or have kept in repair the approaches of the Newton Street Viaduct or those portions of the Newton street viaduct exclusive of the portion which extends over the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company or any other portion of said viaduct.

(Signed) Paul H. Maloney

Sworn to and subscribed before me this 14th day of May, 1923. (Signed) Frank A. Miller, Notary Public. (Seal)

[fol. 281]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HERMAN H. UECKERT—Filed May 14th, 1923

STATE OF TEXAS,

County of Harris:

Personally came and appeared before me, the Undersigned authority, duly commissioned and qualified, Herman H. Ueckert, known to me, who upon being by me first duly sworn did depose and say that he is the same Herman H. Ueckert who heretofore made affidavit with reference to the viaduct known as the Newton Street viaduct which crosses the property of the Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth District (Algiers) of the City of New Orleans and that he is now and for many years past has been in the employ of the Morgan's Louisiana & Texas Railroad & Steamship Company as supervisor of structures, and that in his opinion the cost to repair and put in a safe and suitable condition for vehicular and other traffic the existing viaduct over, above and across the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans known as Algiers within the limits of said property which connects the two ends of Newton Street will be in excess of the sum of Forty eight thousand (\$48,000.00) Dollars, and the cost to repair and put in a safe and suitable condition for vehicular and other traffic the entire viaduct would be in excess of Eighty five thousand (\$85,000.00) Dollars; said estimates having been made by affiant on March 17, 1923, after making a complete and detailed inspection of said viaduct and said estimate being based on the work being undertaken by July 1, 1923. That the reason it would now cost in the opinion of the affiant more to repair the said viaduct than as stated in his affidavit above referred to is due to the fact that corrosion has been progressing rapidly since the examination made by affiant on which he based his former estimate of cost of repair. That if said viaduct is repaired in the opinion of affiant it will cost \$4,500.00 per year properly to maintain same, and that if same is properly maintained said viaduct will last for twenty-five years.

(Signed) H. H. Ueckert,

Sworn to and subscribed before me on this the 10th day of May, 1923. (Signed) Mrs. Georgia Nance, Notary Public in and for Harris County, Texas. (Commission expires June 1st, 1923.) (Seal.)

ORDER No. 117

[Title omitted]

REOPENED

Pursuant to notice, this cause was re-opened and came on for further hearing at a general session of the Commission held in Baton Rouge, Louisiana, on March 29, 1923.

The attorney for the plaintiff filed with the Commission the opinion of the special three judge Court and the injunctions and orders rendered thereon in the case of "Morgan's Louisiana and Texas Railroad and Steamship Company vs. Louisiana Public Service Commission," No. 114 on the docket of the said court. Special counsel for the Commission filed with the Commission the record made before the Railroad Commission of Louisiana in the case of the Police Jury of the Parish of Beauregard vs. Gulf, Colorado & Santa Fe Railway Co., et al.

As the facts before the Commission show that the repairs to the Newton Street viaduct would be approximately \$50,000.00, and of this amount only a part would apply to the bridge or overhead viaduct crossing the property of the Morgan's Louisiana and Texas Railroad and Steamship Company between the two ends of Newton Street in the Fifth Municipal District of New Orleans, known as Algiers, it is quite apparent that the cost to the Morgan's Louisiana and Texas Railroad and Steamship Company of repairing the viaduct would be considerably less than \$50,000.00, assuming that the figures formerly sworn to before the Commission are correct.

It is stated in the opinion rendered by the three Federal judges who heard the case above referred to that there is already a viaduct over the M. L. & T. properties between the two ends of Newton Street in Algiers and that the M. L. & T. R. R. & S. S. Co., had granted the public a right of way over the properties. In our opinion it is the duty of the M. L. & T. R. R. & S. S. Co. to properly maintain and keep the said crossing in repair over its said properties, and that it is within the jurisdiction of this Commission to require the said M. L. & T. R. R. & S. S. Co. to keep its said viaduct in repair over its said properties there having been provided by the City of New Orleans approaches to the said viaduct, which approaches it is the duty of the City of New Orleans to keep in repair or to have the same kept in repair. This we understand, the city has agreed to do.

There is also an expression in the opinion of the Court which indicates that the Court was unwilling to accept a broad construction of the order as contented for by the counsel for the Commission who argued the case. It, therefore, becomes necessary that we should make plain our position as to the construction to be placed upon the orders which have been enjoined by the Court.

Our position, as above stated, is that the M. L. & T. R. R. & S. S.

Co. should repair and maintain at its own expense that portion of the so-called Newton Street viaduct which is over above and across its tracks and property. Had plans and specifications been submitted under our former order proposing this, they would have had serious consideration.

An order requiring this to be done is absolutely in the interest of the safety of the public, whose lives and property are daily jeopardized by the condition of the Newton Street viaduct, which has been, and is now, condemned by the officials of the City of New Orleans for all traffic, except pedestrians. The record before the Commission shows that the center spans of the Newton Street viaduct, which are immediately over the main line tract of the M. L. & T. R. R. & [fol. 283] S. S. Co. are in a very bad state of decay and deterioration, due to the erosion from the smoke from the locomotives which are in constant operation under the viaduct. The public interest in this case is great and important and we would fail in a most important duty did we not exhaust every means within our power to require this dangerous overhead crossing to be repaired and thereafter maintained in a safe condition for all traffic which it is intended to bear.

The premises considered, it is,

Ordered, that within fifteen days from the date of this order the Morgan's Louisiana and Texas Railroad and Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana and Texas Railroad and Steamship Company in the Fifth Municipal District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once.

All orders in conflict herewith are cancelled, rescinded and annulled.

By order of the Commission,

Baton Rouge, Louisiana, March 29, 1923.

Huey P. Long, Chairman. Francis Williams, Commissioner. (Signed) Henry Jastremski, Secretary.

[fol. 284]

IN UNITED STATES DISTRICT COURT

Railroad Commission of Louisiana Rule No. 20

Obstructing Public Crossings

RAILROAD COMMISSION OF LOUISIANA RULE NO. 20—Filed May 14, 1923

"20. No trains shall obstruct a public crossing or street for a greater length of time than ten minutes."

[fol. 285]

IN UNITED STATES DISTRICT COURT

Railroad Commission of Louisiana Rule No. 21

Filling in Public Crossings

RAILROAD COMMISSION OF LOUISIANA RULE NO. 21—Filed May 14,
1923

"At all public road crossings or streets where vehicles cross same (outside of incorporated towns or cities) the space between the rails and a space of eighteen inches on the outside of each rail shall be raised to the level of the top of the rails by a filling of plank, rock or gravel, and shall be kept in good condition at all times. When crossings are located under the track they shall also be kept in thorough repair and drained.

[fol. 286]

IN UNITED STATES DISTRICT COURT

RAILROAD COMMISSION OF LOUISIANA RULE NO. 22—Filed May 14,
1923

Approaches to Public Crossings

"22. At all places where a railroad crosses a public highway it shall be the duty of the railroad company to construct a ramp with an easy grade not greater than five to one, and not less than fifteen feet wide, to be kept in good condition at all times by the railroad company.

When made of dirt, the dirt used in the construction of the ramp must be taken from at least ten feet on either side of the ramp.

(By "public highway" is meant such highways as are under the control of the police juries of the different parishes.)"

[fol. 287]

IN UNITED STATES DISTRICT COURT

RAILROAD COMMISSION OF LOUISIANA ORDER NO. 219—Filed May
14th, 1923

At a General Session of the Railroad Commission of Louisiana held at its office at Baton Rouge, Monday, January 5th, 1903, after due notice given to and hearing of the railroads operating in Louisiana the following rule was adopted:

Ramps at Public Highways

Ordered, that at all places where a railroad crosses a public highway, it shall be the duty of the railroad Company to construct a

ramp with an easy grade not greater than five to one, and not less than fifteen feet wide, to be kept in good condition at all times by the railroad company.

When made of dirt, the dirt used in the construction of the ramp must be taken from at least ten feet on either side of the ramp.

By "Public Highway" is meant such highways as are under the control of the Police Juries of the different Parishes.

The ramps must be built before July 1st, 1903.

By order of the Commission.

Baton Rouge, Louisiana, January 6th, 1903.

C. L. De Fuentes, Chairman. W. L. Foster, Commissioner.
Overton Cade, Commissioner.

Attest: A true copy. (Signed) W. M. Barrow, Secretary. (Seal.)

[fol. 288] IN UNITED STATES DISTRICT COURT

POLICE JURY, Parish of St. Charles,

vs.

LAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, TEXAS & PACIFIC RAILWAY COMPANY, MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP Co.

Petition to Compel the Defendant Companies to Repair and Maintain Public Crossings

RAILROAD COMMISSION OF LOUISIANA ORDER No. 266—Filed May 14th, 1923

The Commission having issued a general order to all carriers requiring them to construct and maintain ramps at public highways, and no further order in this case necessary, and it is therefore, Ordered, That the case be dismissed.

By order of the Commission.

Baton Rouge, Louisiana, March 9, 1903.

C. L. de Fuentes, Chairman. W. L. Foster, Overton Cade, Commissioners.

A true copy. (Seal.) W. M. Barrow, Secretary.

[fol. 289] IN UNITED STATES DISTRICT COURT

No. 589

HAAS & LYLES

vs.

TEXAS & PACIFIC RAILWAY COMPANY

RAILROAD COMMISSION LOUISIANA ORDER No. 558—Filed May 14th,
1923

Road Crossings at Bayou Beouf

Filed November 8, 1905

The Commission has inspected the crossings about which complaint is made in this case, and finds the physical conditions such that to require the raising of the defendant company's road-bed would result in throwing the line out of grade for some distance, and to lower the roadway by further excavation would cause it to be subjected to overflow from the Bayou. On the east side of the Bayou, the public road runs under the second and third spans of the railroad company's bridge, and the height from the ground to the bottom cord or sill of the bridge is ten feet, while the width of the road is thirteen feet, five inches. On the west side of the Bayou, the public road also runs under the railroad bridge, and the height from the ground to the bottom cord of the bridge is ten feet, seven inches, while the width of the road is eight feet seven inches. The space in both cases appears to be as large as it is possible, under the peculiar conditions surrounding each case, to make it, and should be ample for any ordinary traffic. The premises considered, it is,

Ordered, That the case be dismissed.

By order of the Commission.

Baton Rouge, Louisiana, October 10, 1906.

C. L. de Fuentes, Chairman. W. L. Foster, Overton Cade,
Commissioners. W. M. Barrow, Secretary. (Seal.)

[fol. 290] IN UNITED STATES DISTRICT COURT

No. 781

RAILROAD COMMISSION OF LOUISIANA

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY

RAILROAD COMMISSION OF LOUISIANA ORDER No. 699—Filed May
14th, 1923

Public Road Crossings

Heard April 25, 1907

Having under consideration the record in this case and finding that the defendant company has not properly constructed its crossings over the public highways in the parish of Avoyelles, it is,

Ordered, that the defendant, Louisiana Railway & Navigation Company, be and is hereby notified and required within fifteen days after the date of this order to put all of the public road crossings which its railroad crosses in Avoyelles Parish in good condition, of the width and grade required by the rules of the Commission.

By order of the Commission,

Baton Rouge, Louisiana, April 25, 1907.

C. L. de Fuentes, Chairman, Overton Cade, J. J. Meredith,
Commissioners. (Signed) W. M. Barrow, Secretary.
(Seal.)

[fol. 291]

No. 1384

SIDNEY ROUSSEL

versus

THE MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP
COMPANY

RAILROAD COMMISSION OF LOUISIANA ORDER No. 1225—Filed May
14, 1923

Private Road Crossing Over Tracks Near Lafourche

The plaintiff in this case, ask that an order be adopted by the Commission, requiring the defendant company to construct a private road crossing over its tracks, for the use of plaintiff, on his plantation near Lafourche.

After a complete investigation and inspection made by the Commission, it is believed that the location of a road crossing on plaintiff's property, over defendant's tracks, would be an unreasonable and unnecessary requirement, inasmuch as the track crosses the land on an elevated grade, and, also because, also, there is a reasonable means of passing from one part of plaintiff's place to another, without the use of such a crossing.

It is, therefore, ordered that the petition herein filed be, and it is hereby, denied.

By order of the Commission.

Baton Rouge, Louisiana, January 10, 1911.

J. J. Meredith, Chairman. Henry B. Schreiber, Shelby Taylor, Commissioners. W. M. Barrow, Secretary. (Seal)

Attest: A true copy. W. M. Barrow, Secretary.

[fol. 292]

No. 1625

POLICE JURY OF THE PARISH OF EAST BATON ROUGE

versus

LOUISIANA RAILWAY & NAVIGATION COMPANY

ORDER NO. 1396—Filed May 14, 1923

Public Road Crossings, Parish of East Baton Rouge

In this case, in which the Commission is asked to issue and order requiring defendant company to comply with its Rules 21 and 22, relative to public road crossings, the defendant company has filed an answer to the complaint, notifying the Commission that it will comply with the said rules, work to begin at the earliest possible date.

It is the duty of the railroad company to keep its crossings up to the standard required by the Commission's rules, at all times, or subject itself to a penalty. No penalty, however, will be imposed at this time, as the unprecedented weather conditions of the past winter have delayed road work, and caused all public roads and crossings to need repair. There will, however, be no reasonable excuse for a continuance of the conditions complained of, and it is therefore,

Ordered: that the Louisiana Railway & Navigation Company defendant be, and it is hereby, commanded and required within thirty (30) days from the date hereof, to repair all of its public road cross-

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ings in East Baton Rouge Parish, so as to have them conform to the requirements of the rules and regulations of this Commission.

By order of the Commission.

Baton Rouge, Louisiana, April 10, 1912.

Shelby Taylor, Henry B. Schreiber, Commissioners.

Attest: A true copy. Henry Jastremski, Secretary. (Seal.)

[fol. 293]

No. 1959

CITIZENS OF BERNICE, LOUISIANA,

versus

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

RAILROAD COMMISSION OF LOUISIANA ORDER No. 1648—Filed May 14th, 1923

in the Matter of Opening Crossing in Town of Bernice, Louisiana.

The petition in this case asks the Commission to enter an order requiring the Chicago, Rock Island & Pacific Railway Company to open up Second Street Crossing in the town of Bernice, Louisiana, to the extent that it may accommodate all traffic incident to a town the size of Bernice. The company has notified the Commission that it will put in this crossing at its own expense. No time limit however, has been set by the Company for the completion of the work. and it is, therefore,

Ordered, That the Chicago, Rock Island & Pacific Railway Company, be and it is hereby commanded and required, by January 1, 1914, to open up for traffic Second Street Crossing, in the town of Bernice, Louisiana.

By order of the Commission.

Baton Rouge, Louisiana, December 2, 1913.

Shelby Taylor, Chairman, B. A. Bridges, Commissioners.
Henry Jastremski, Secretary. (Seal.)

Attest: A true copy. Henry Jastremski, Secretary.

[L. 294] LOUISIANA PUBLIC SERVICE COMMISSION ORDER No. 1—Filed May 14, 1923

At the session of the Louisiana Public Service Commission, held in its office at the Capitol, at Baton Rouge, Louisiana, on this date, 10:00 a. m., for good cause shown, it is

Ordered, that all rates, rules, regulations, orders and decisions of the Railroad Commission in effect on June 30, 1921, be, and the same are hereby, adopted as the rates, rules, regulations, orders and decisions of the Louisiana Public Service Commission, and shall remain in full force and effect until further ordered.

By order of the Commission.

Baton Rouge, Louisiana, July 1, 1921.

(Signed) Shelby Taylor, Chairman, John T. Michel
Commissioners. (Signed) Henry Jastremski, Secretary.
(Seal.)

Certificates of Henry Jastremski to each of above orders omitted in printing.

[fol. 295] NOTE.—The following exhibits were transmitted in the originals to the Supreme Court of the United States as per stipulation of counsel, copied herein.

- (1) Blue-print marked "Morgan Co. No. 1".
- (2) Blue-print attached to the affidavit of Herman H. Ueckert.
- (3) Six photographs marked 1, 3, 6, 8, 11 & 12.

[fol. 296] U. S. DISTRICT COURT, EASTERN DIST. OF LOUISIANA,
BATON ROUGE DIVISION

No. 114

[Title omitted]

DECREE GRANTING INTERLOCUTORY INJUNCTION—Filed May 23,
1923

In this case the Court considering that the issues of facts and the questions of law are the same as formerly considered by the Court on the previous application for an interlocutory injunction.

It is ordered, adjudged and decreed that an interlocutory injunction do issue herein as prayed for.

(Signed) N. P. Bryan, U. S. Circuit Judge. Alex C. King,
U. S. Circuit Judge. Rufus E. Foster, U. S. District Judge,
New Orleans, La., May 23, 1923.

[fol. 297]

Injunction Issued June 6th, 1923

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF
LOUISIANA

[Title omitted]

WRIT OF INJUNCTION

The President of the United States of America to Louisiana Public Service Commission, Huey P. Long, Shelby Taylor, and Francis Williams, individually and as members of said La. Public Service Commission, and Adolph V. Coco, as Atty. Genl. of La., and Wylie M. Barrow, Asst. Atty. Genl. of La. and attorney for the La. Public Service Commission, Greeting:

Whereas, it has been represented unto us in our said District Court on the part of Morgan's Louisiana & Texas Railroad & Steamship Company in a Supp. & Amendatory bill of complaint lately exhibited against you and each of you touching certain matters and things therein set forth,

Now, therefore, in consideration of the premises and of the allegations in said Supp. & Amendatory bill contained, you, the said La. Pub. Service Commission, Huey P. Long, Shelby Taylor, & Francis Williams, ind. & as members of said Commission, and Adolph V. Coco, as Atty. Genl. of La., and W. M. Barrow, Asst. Atty. Genl. of La. and Atty. for said La. Pub. Service Commission, your agents, attorneys, and servants and each of you, are hereby commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from commencing any suit or proceeding or in any other manner attempting to enforce the provisions of the order rendered by said Commission on March 29, 1913, and from enforcing or taking any steps to enforce compliance by petitioner with said order and from taking any steps whatever to collect any penalties for failure on the part of petitioner to comply with said order and any and all parties be enjoined from proceeding against petitioner under said order, and that you remain so inhibited and enjoined until the further order of our said Court in the premises,

Witness, the Honorable Rufus E. Foster, Judge of said Court, at the City of New Orleans, this 6th day of June in the year of our Lord, 1923.

(Signed) H. J. Carter, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 298] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

In Equity. No. 114

[Title omitted]

PETITION FOR APPEAL AND ORDER—Filed June 7, 1923

To the Honorable Rufus E. Foster, District Judge United States District Court, Eastern District of Louisiana, Baton Rouge Division:

The defendants above named, feeling themselves aggrieved by the decree made and entered in this cause on the 15th day of February, 1923, and on the 23rd day of May, 1923, A. D., and the interlocutory injunction issued in accordance with the said decree entered on the 23rd day of May, 1923, do hereby appeal from said decree and order to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith and they pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated may be sent to the Supreme Court of the United States:

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

(Signed) W. M. Barrow, Solicitor.

Order

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of One Hundred 00/100 Dollars.

(Signed) Rufus E. Foster, Judge. June 7/23.

Service accepted; all rights reserved.

(Sgd.) Denegre, Leovy & Chaffe, Solicitors for Morgan's La. & Texas R. R. & S. S. Co.

[fol. 299] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 7, 1923

The defendants herein pray for an appeal from the judgment and decree of this Court entered May 23rd, 1923, granting plaintiff an interlocutory injunction as prayed for, to the Supreme Court of the United States, and assign for error:

I. That the Court erred in granting said interlocutory injunction, because:

(1) The order of the Louisiana Public Service Commission against which said interlocutory injunction is issued, is valid exercise of the police power of the State of Louisiana, exclusively vested in said Commission.

(2) The Police Power of the State of Louisiana is and cannot be restricted by any of the powers vested in the Municipality of the City of New Orleans.

(3) The exercise of the police power of the State of Louisiana shall never be abridged.

(4) All of the supervision, regulation and control of steam Railroads, is vested by the Constitution of the State of Louisiana of 1921, in the said Louisiana Public Service Commission, and exists in, and may be exercised by said Commission in the interest of the public convenience and safety notwithstanding any contracts which may have been made by the City of New Orleans with steam railroads operating in said city.

(5) The said order of the said Commission requiring plaintiff company within fifteen (15) days from its date to repair and put [fol. 300] in a safe condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over and across the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company in Algiers, Louisiana, which is the Fifth Municipal District of the City of New Orleans, is a valid exercise of the powers vested by the Constitution of the State of Louisiana, exclusively in said Louisiana Public Service Commission, and in the exercise of such power said Commission has the right, and it is its duty, to do all things necessary to a proper exercise of its power.

II. The Court erred in granting said interlocutory injunction because the Supreme Court of Louisiana has held that the said Louisiana Public Service Commission has power to require steam railroads operating in the State of Louisiana to build and maintain suitable overhead crossings to carry newly constructed public highways over their tracks.

III. The Court erred in granting said interlocutory injunction because the court itself holds that:

(1) There is at present a viaduct at Newton Street in Algiers, City of New Orleans, much in need of repair.

(2) That said viaduct was constructed in 1907, pursuant to an agreement incorporated in various ordinances, between plaintiff, the City of New Orleans, and the Algiers Railway & Lighting Company, which contract has been abandoned and repudiated by the City of New Orleans.

(3) That said Newton Street viaduct is in a dangerous condition, having been condemned for use by the city authorities of the City of New Orleans.

(4) The opinion of the special three judge court that heard the case concedes that the police power can never be contracted away and that a railroad may be required to construct a crossing over a street or public road, at its own expense.

IV. The power and authority to regulate all steam railroads operating within the State of Louisiana, prior to the Constitution of the State of Louisiana adopted July 1st, 1921, was exclusively vested in the Railroad Commission, and under the provisions of the Louisiana Constitution of 1898, and therefore could not by legislative enactment, without amending the state constitution be transferred to the municipal government of the City of New Orleans.

[fol. 301] Wherefore, defendants pray that the said injunction and decree granting plaintiff an interlocutory injunction may be reversed, and that said Court be ordered to set aside said interlocutory injunction.

(Signed) W. M. Barrow, Solicitor for Defendants.

Service accepted: all rights reserved.

Denegre, Leovy & Chaffe, Solicitors for Morgan's La. & Texas
R. R. & S. S. Co.

[fols. 301 $\frac{1}{2}$ -302] BOND ON APPEAL.—For \$100; filed and approved
June 7, 1923; omitted in printing

[fol. 303] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

STIPULATION AS TO EXHIBITS, ETC.—Filed June 30th, 1923

It is stipulated by and between counsel for plaintiff and defendants that all affidavits and exhibits offered by plaintiff and defendants at the hearing of the application for the first interlocutory injunction were offered in evidence at the hearing of the application for the second interlocutory injunction.

It is further stipulated and agreed that all notices of applications for and hearings on applications for temporary injunctions herein, as required by law, were waived.

It is further stipulated and agreed that the South New Orleans Lighting and Traction Company is the successor in title of the Algiers Railway & Lighting Company to the franchises granted by the ordinances of the City of New Orleans offered in evidence by plaintiff.

It is further stipulated and agreed that the following exhibits filed

in evidence at the hearing on the application for the interlocutory injunction shall be sent up in the original, viz:

Photographs marked Exhibits 1, 3, 6, 8, 11 and 12.

Blue print of map attached to affidavit of Herman H. Ueckert of January 27th, 1923, and blue-print marked "Morgan Company No. 1."

It is further stipulated and agreed that in preparing the transcript in this case only those portions of the deed of sale of the railroad to the Morgan's Louisiana & Texas Railroad & Steamship Company dated April 9, 1878, pertinent to the issues in this case shall be included in the transcript.

(Signed) W. M. Barrow, Attorney for Defendants. Denegre,
Leovy & Chaffe, Attorney for Plaintiff.

[fol. 304] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
LOUISIANA, BATON ROUGE DIVISION

[Title omitted]

PRECIPE FOR TRANSCRIPT—Filed June 7, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana:

Please prepare a transcript of the record in the above case on appeal to the Supreme Court of the United States, containing the following items:

1. Bill of complaint and restraining order thereon.
2. The Exhibits attached to the Bill of Complaint.
3. The answer and the exhibits attached thereto, being Order No. 84 of the Louisiana Public Service Commission.
4. Motion to dismiss Bill of Complaint. (Note:) The exhibit attached to the Motion is the same as exhibit attached to Answer.
5. Complainant's exhibits filed January 27, 1923 on hearing before three Judges of the application for interlocutory injunction as follows:
 - (a) Ordinance No. 2906, New Council Series, City of New Orleans (same as exhibit A, attached to Bill).
 - (b) Ordinance No. 2510, N. C. S., same as Exhibit B to Bill.
 - (c) Ordinance No. 2561, N. C. S., same as Exhibit C to Bill.
 - (d) Ordinance No. 3792, N. C. S., same as Exhibit D to Bill.
 - (e) Ordinance No. 5869, Commission Council Series, same as Exhibit E to bill.

- (f) Ordinance No. 3996, N. C. S., same as Exhibit E to bill.
- (g) Letter from City Attorney Kittredge to Paul H. Maloney, Commissioner, dated May 13, 1922.
- (h) Two Conveyance Office Certificates.
- (i) Act of Sale of property by Charles A. Barnard, to South New Orleans Light & Traction Company.
- (j) Resolution of M. L. & T. R. R. & S. S. Co. of February 7, 1905 (N. B. Filed in duplicate).
- (k) Affidavit of Herman H. Ueckert, attached to blue-print, sent up in original under stipulation of counsel.
- 6. Affidavits filed by complainant January 27, 1923.
- 7. Transcript of testimony taken before Louisiana Public Service Commission.
- 8. Petition for re-hearing on behalf of M. L. & N. T. R. R. & S. S. Co. to Louisiana Public Service Commission.
- 9. Minutes of Louisiana Public Service Commission.
- [fol. 305] 10. Petition of residents and property holders of Fifth District of New Orleans, to Louisiana Public Service Commission.
- 11. Notices of Louisiana Public Service Commission.
- 12. Resolution authorizing Commissioner to hold hearings.
- 13. Assignment of argument before entire Commission.
- 14. Louisiana Public Service Commission Order No. 82.
- 15. " " " " " " 84 (attached as exhibit to answer).
- 16. Affidavit of Huey P. Long.
- 17. Affidavit of Shelby Taylor.
- 18. Opinion.
- 19. Decree granting interlocutory injunction.
- 20. Bond.
- 21. Interlocutory Injunction directed to the Louisiana Public Service Commission and each of its three members.
- 22. Supplemental and amendatory bill of complaint.
- 23. Temporary Restraining Order issued April 13, 1923.
- 24. Answer to supplemental and amendatory Bill of Complaint.
- 25. Affidavit of Paul Maloney.
- 26. Affidavit of Herman H. Ueckert.

27. Order No. 117 of the Louisiana Public Service Commission.

28. Rules Nos. 20, 21 & 22, and orders Nos. 249, 266, 558, 699, 1225, 1396, 1648, of the Railroad Commission of La. and Order No. 1 of the La. Public Service Commission.

29. Decree of three Judges filed May 23, 1923.

30. Interlocutory Injunction issued in accordance with aforesaid decree.

31. Petition for Appeal and order granting same.

32. Assignment of Errors.

33. Appeal Bond.

34. Stipulation of counsel to transmit certain blue-prints and photographs in the originals.

35. Stipulation of counsel that all affidavits and exhibits offered by plaintiff and defendants at the hearing of the application for first interlocutory injunction were offered in evidence at the hearing for the second interlocutory injunction and that all notices of applications for and hearings on applications for temporary injunctions herein as required by law, were waived and that the South New Orleans Light & Traction is the successor in title of the Algiers Railway & Lighting Company to the franchises granted by the Ordinances of the City of New Orleans offered in evidence by plaintiff.

36. This Praeipe.

[fol. 306] 37. The Clerk's certificate with certificate of costs.

(Signed) W. M. Barrow, Special Counsel for Louisiana Public Service Commission. (Signed) Denegre, Leovy & Chaffe, Attorneys for Morgan's Louisiana & Texas Railroad & Steamship Company.

[fol. 307] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

CITATION AND SERVICE—Filed June 15, 1923 (omitted in printing)

[fol. 308] Service of a copy of the within citation is hereby admitted this 18th day of June, 1923, A. D.

Denegre, Leovy & Chaffe, Solicitors for Morgan's La. & Tex. R. R. & S. S. Co.

[fol. 309] [File endorsement omitted.]

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[fol. 310]

IN UNITED STATES DISTRICT COURT

Clerk's Office

CLERK'S CERTIFICATE

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 306 pages contain and form a full, complete, true and perfect transcript of the record, assignment of Errors and all proceedings had (except certain exhibits transmitted in the original) in the cause entitled Morgan's Louisiana and Texas Railroad & Steamship Company versus Louisiana Public Service Commission, et als., No. 111 of the Docket of the Baton Rouge Division of said Court; said transcript being made up in accordance with Præcipe, copied therein.

Witness my hand and the seal of said court, at the City of New Orleans, La., this 2nd day of July, A. D., 1923.

H. J. Carter, Clerk. [Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

Endorsed on cover: File No. 29,731. E. Louisiana D. C. U. S. Term No. 421. Louisiana Public Service Commission, Huey P. Long, chairman; Shelby Taylor and Francis Williams, members thereof, appellants, vs. Morgan's Louisiana & Texas Railroad & Steamship Company. Filed July 9th, 1923. File No. 29,731.

FILED

FEB 1 1924

WM. R. STANSB

CLERK

SUPREME COURT OF THE UNITED STATES

(October Term, 1923)

No. 421

LOUISIANA PUBLIC SERVICE COMMISSION,
HUEY P. LONG, CHAIRMAN, AND SHELBY
TAYLOR AND FRANCIS WILLIAMS, MEM-
BERS THEREOF,
Appellants,

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD &
STEAMSHIP COMPANY,
Appellee.

*Appeal from the District Court of the United States for the
Eastern District of Louisiana.*

BRIEF ON BEHALF OF THE LOUISIANA PUBLIC
SERVICE COMMISSION, ET AL., APPELLANTS.

A. V. COCO,
Attorney General of the State of
Louisiana.

W. M. BARROW,
Special Counsel.

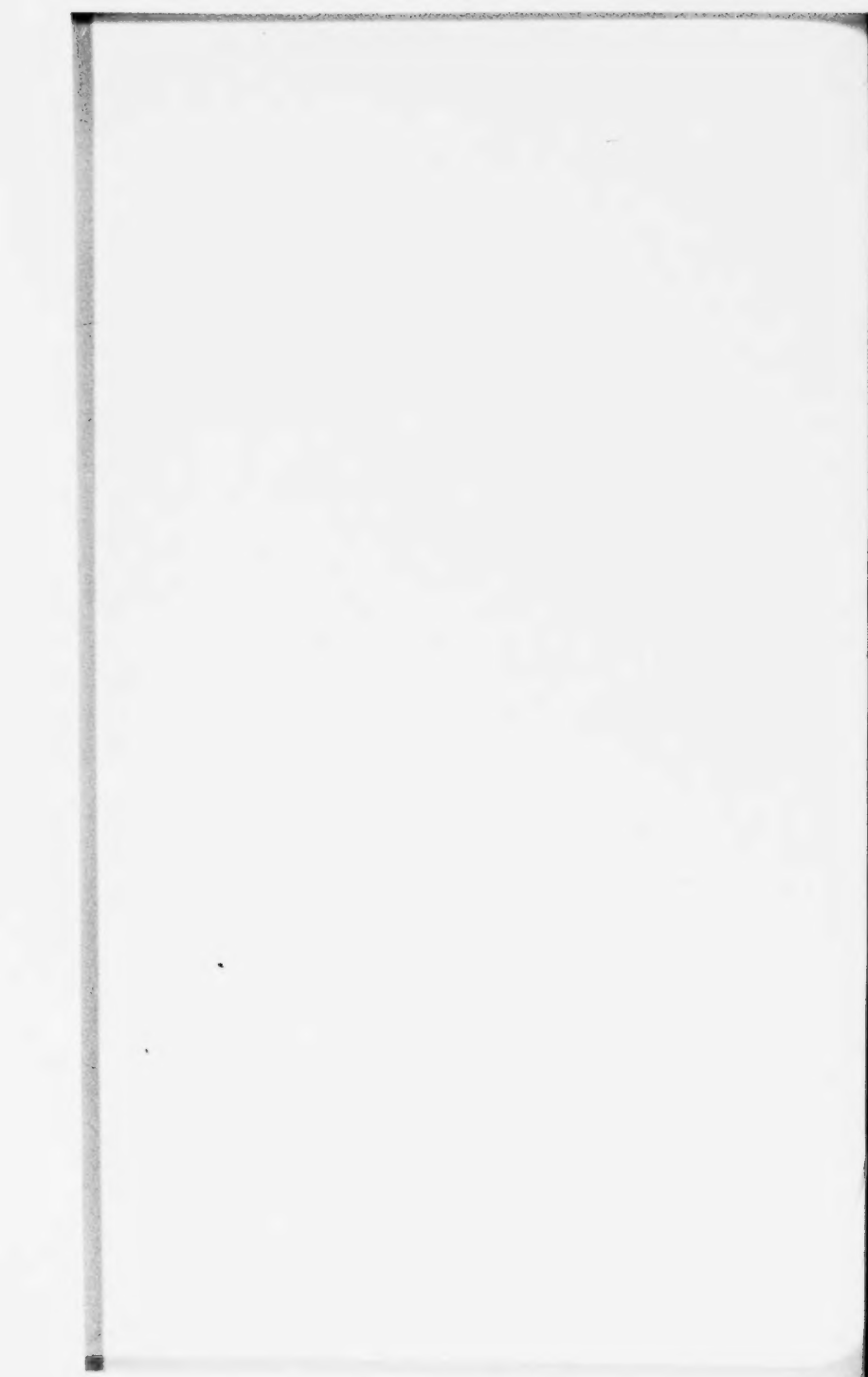


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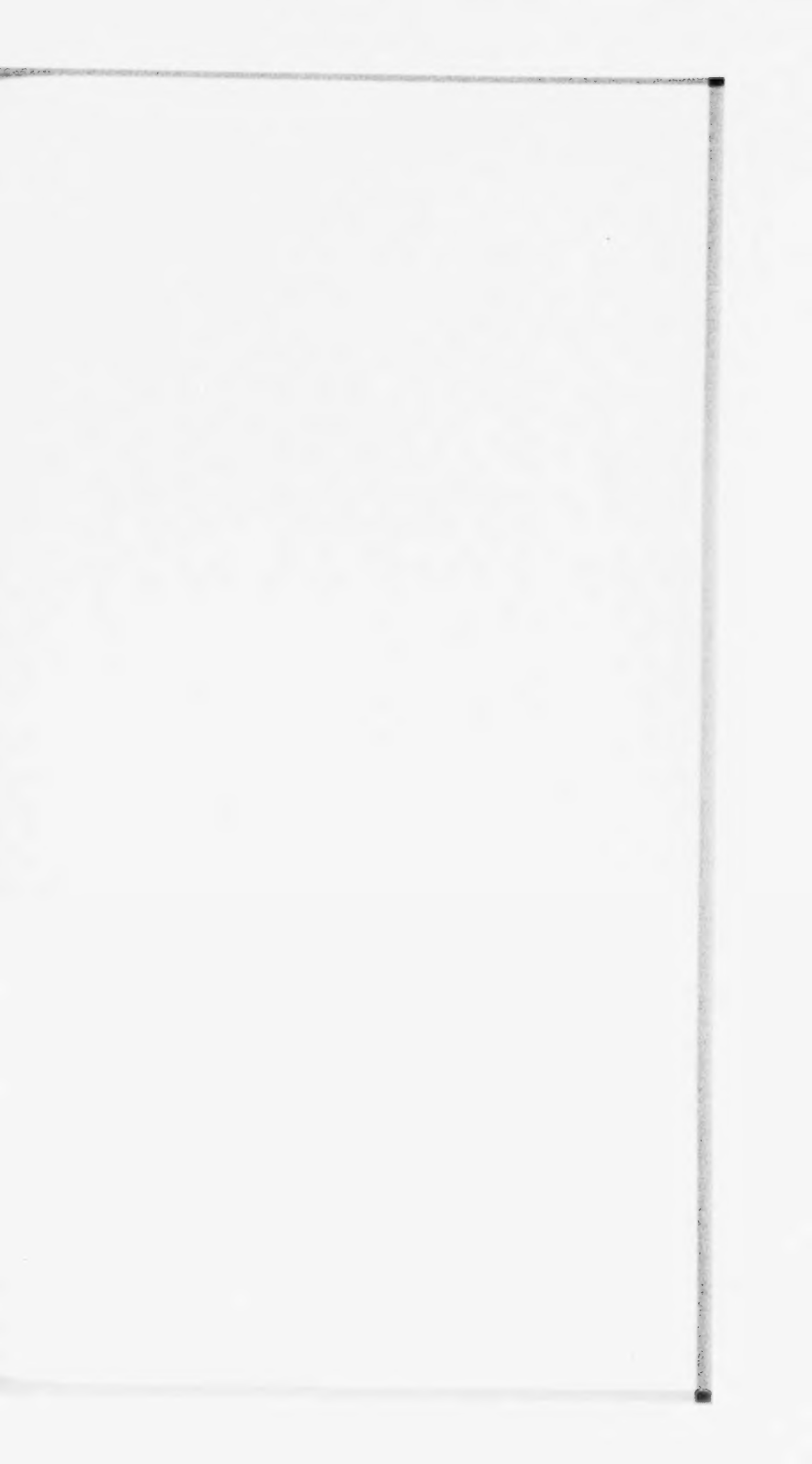
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SUPREME COURT OF THE UNITED STATES

(October Term, 1923)

No. 421

LOUISIANA PUBLIC SERVICE COMMISSION,
HUEY P. LONG, CHAIRMAN, AND SHELBY
TAYLOR AND FRANCIS WILLIAMS, MEM-
BERS THEREOF,

Appellants,

vs.

MORGAN'S LOUISIANA & TEXAS RAILROAD &
STEAMSHIP COMPANY,

Appellee.

*Appeal from the District Court of the United States for the
Eastern District of Louisiana.*

BRIEF ON BEHALF OF THE LOUISIANA PUBLIC
SERVICE COMMISSION, APPELLANT.

STATEMENT OF THE CASE.

Note: The word "Commission," when used singly in this brief, refers to "Louisiana Public Service Commission." The words "Morgan Railroad" mean "Morgan's Louisiana & Texas Railroad & Steamship Company."

This was a suit in equity brought by the Morgan's Louisiana & Texas Railroad & Steamship Company against the Louisiana

Public Service Commission, to enjoin an order of the Commission requiring the railroad company to repair and put in a safe condition an existing viaduct over its tracks in the Fifth Municipal District of the City of New Orleans, known as Algiers.

The cause was instituted in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, on the 17th day of January, 1923.

The appellee applied for, and was granted, a temporary restraining order, restraining and prohibiting the Louisiana Public Service Commission, its members, attorneys, employees, agents and all persons acting under its control, and the Attorney General and the Assistant Attorney General of Louisiana, from commencing any suit or proceeding to enforce or attempting to enforce the provisions of Order No. 84, adopted by the Commission on November 11, 1922. (Tr. 10.) This order was subsequently cancelled by the order of March 29, 1923, the only order now in controversy.

On January 27, 1923, the appellants appeared and filed their answer (Tr. 28), and on the same day filed a motion to dismiss the bill of complaint. (Tr. 38.)

The application for an interlocutory injunction was heard by Circuit Judges Bryan and King and District Judge Foster, on the pleadings and affidavits, and, on February 15, 1923, the opinion of the court, rendered by Foster, District Judge, was filed, ordering an interlocutory injunction issued as prayed for. (Tr. 151.)

The Louisiana Public Service Commission then reopened its proceedings, and subsequently, after notice to the appellee, af-

fording opportunity to all parties at interest to be heard, on March 29, 1923, cancelled, rescinded and annulled its previous Order No. 84, of November 11, 1922, and adopted in lieu thereof its Order No. 117, the material part of which is as follows:

"Ordered, that within fifteen days from the date of this order the Morgan's Louisiana & Texas Railroad & Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once.

All orders in conflict herewith are cancelled, rescinded and annulled." (Tr. 170.)

Appellant filed, on April 13, 1923, its supplemental and amendatory bill of complaint (Tr. 158), renewing its prayer for an interlocutory, and, after due hearing, a perpetual injunction against the Public Service Commission's last order, and in the meantime applied for and was granted a second temporary restraining order by District Judge Foster.

Answer to the supplemental and amendatory bill was filed May 14, 1923, and the application for an interlocutory injunction against the final order of the Commission was heard by Circuit Judges Bryan and King and District Judge Foster, in compliance with Section 266 of the Judicial Code, and after hearing arguments on the bill and answer and affidavits filed by both appellants and appellee, the court as above constituted,

entered a decree granting appellants an interlocutory injunction. (Tr. 178.)

From this decree, appellants appealed direct to this Honorable Court

ASSIGNMENT OF ERRORS.

The following are assigned as errors in the decision of the lower court:

I. That the Court erred in granting said interlocutory injunction, because:

(1) The order of the Louisiana Public Service Commission, against which said interlocutory injunction was issued, is a valid exercise of the police power of the State of Louisiana, exclusively vested in said Commission.

(2) The police power of the State of Louisiana is and cannot be restricted by any of the powers vested in the municipality of the City of New Orleans.

(3) The exercise of the police power of the State of Louisiana shall never be abridged.

(4) All of the powers of supervision, regulation and control of steam railroads is vested by the Constitution of the State of Louisiana of 1921 in the said Louisiana Public Service Commission and exists in, and may be exercised by, said Commission in the interest of the public convenience and safety, notwithstanding any contracts which may have been made by the City of New Orleans with steam railroads operating in said city.

(5) The said order of the said Commission requiring plaintiff company within fifteen (15) days from its date to repair and put in a safe condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over and across the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company, in Algiers, Louisiana, which is the Fifth Municipal District of the City of New Orleans, is a valid exercise of the powers vested by the Constitution of the State of Louisiana exclusively in

said Louisiana Public Service Commission, and in the exercise of such power said Commission has the right, and it is its duty, to do all things necessary to a proper exercise of its power.

II. The Court erred in granting said interlocutory injunction because the Supreme Court of Louisiana has held that the said Louisiana Public Service Commission has power to require steam railroads operating in the State of Louisiana to build and maintain suitable overhead crossings to carry newly constructed public highways over their tracks.

III. The Court erred in granting said interlocutory injunction because the Court itself holds that:

(1) There is at present a viaduct at Newton Street, in Algiers, City of New Orleans, much in need of repair.

(2) That said viaduct was constructed in 1907, pursuant to an agreement incorporated in various ordinances between plaintiff, the City of New Orleans, and the Algiers Railway & Lighting Company, which contract has been abandoned and repudiated by the City of New Orleans.

(3) That said Newton Street viaduct is in a dangerous condition, having been condemned for use by the city authorities of the City of New Orleans.

(4) The opinion of the special three judge court that heard the case concedes that the police power can never be contracted away and that a railroad may be required to construct a crossing over a street, or public road, at its own expense.

IV. The power and authority to regulate all steam railroads operating within the State of Louisiana, prior to the Constitution of the State of Louisiana adopted July 1, 1921, was exclusively vested in the Railroad Commission under the provisions of the Louisiana Constitution of 1898, and therefore could not, by legislative enactment, without amending the state constitution,

be transferred to the municipal government of the City of New Orleans. (Tr. 180.)

THE ISSUES AS MADE IN THE PLEADINGS.

The Bill of Complaint. (Tr. 1-10.)

The order of the Commission above referred to is contested by the plaintiff as illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for the following reasons:

(a) Said order deprives petitioner of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article I of the Constitution of Louisiana, adopted in the year 1921, in that it requires petitioner to devote its private property to public purposes aforesaid without any compensation therefor.

(b) Said order violates the Fourteenth Amendment to the Constitution of the United States in that it requires plaintiff to devote its private property to the public purposes aforesaid without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and if the said Constitution and laws, either or both, provide to the contrary, then they are unconstitutional, null and void, being in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(c) Said order impairs and renders null and void and of no effect, the obligations of the City of New Orleans under the contract referred to in the bill of complaint between the City of New Orleans and plaintiff, under which the said city acquired the right to cross said petitioner's tract of land in violation of Section 10 of Article I of the Constitution of the United States.

(d) Said Commission has no authority or jurisdiction to render the order complained of.

(e) Said order was rendered after a hearing in which only one member of said Commission was present

(and without allowing petitioner to present argument, though timely requested), in violation of Section 3 of Article VI of the Constitution of the State of Louisiana of 1921, and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, guaranteeing plaintiff equal protection of the laws and against being deprived of its property without due process of law, in that all other hearings are had before at least two members, and unless so held said hearings do not constitute due process of law.

(f) Said order requires petitioner to make use of a part of the public streets of the City of New Orleans, jurisdiction over which is vested exclusively in said city, and said Commission is without power, jurisdiction or authority to compel or permit petitioner to occupy or in any manner use any part or portions of the streets of the City of New Orleans.

(g) That said order releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans to maintain all parts of the viaduct constructed by the City of New Orleans, as aforesaid, in violation of the provisions of Section 13, Article IV, of the Constitution of Louisiana of the year 1921, and of the Fourteenth Amendment to the Constitution of the United States.

(h) Said order is unjust, arbitrary, and unreasonable, and there is no public necessity therefor "in that a viaduct already exists on the site designated in the order herein complained of as aforesaid, which viaduct, if maintained and kept in repair as it should be, and should heretofore have been, as aforesaid, is, would be and would continue to be for more than twenty years amply sufficient to care for all traffic, foot, vehicle, street car, and all other kinds, across petitioner's said tract of land along the prolongation of the two sides of Newton Street, and the said order accordingly constitutes an unreasonable interference with, and burden on, interstate and foreign commerce, contrary to Section 8 of the Constitution of the United States, giving to the Congress of the United States power to regulate foreign commerce with foreign nations and among the several states, and the provisions of the Transportation Act of 1920, as well as a violation of the Fourteenth Amend-

ment to the Constitution of the United States, in that it deprives petitioner of its property without due process of law."

(i) Said order constitutes the taking of petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company in violation of the Fourteenth Amendment of the Constitution of the United States, Section 2 of Article I of the Constitution of the State of Louisiana, in that it deprives petitioner of its property without due process of law, and denies to petitioner the equal protection of the law, in that under the laws of the State of Louisiana, the South New Orleans Light & Traction Company, before acquiring or obtaining any right to cross petitioner's property other than that acquired by the franchise under which it is operating, as aforesaid, has the right to, and is obliged and required to expropriate the right so to do and to pay to petitioner in advance of taking or acquiring thereof, a just and adequate compensation.

The bill of complaint further alleges that the order of the Commission requiring plans to be filed within thirty days from its date has not been complied with, and that the proposed imposition of the fines and penalties for not having obeyed the order aforesaid is contrary to the Constitution of the State of Louisiana and in violation of the Fourteenth Amendment to the Constitution of the United States:

The bill further alleges that the cost of complying with the Commission's original order would exceed \$150,000.00, and of making necessary repairs to the existing viaduct would exceed \$49,000.00. (Sup. Bill, Tr. 159.)

The jurisdiction of the Court rests upon the allegation that this is a controversy between citizens of the same state arising under the constitution and laws of the United States. (Tr. 1-10.)

The Answer. (Tr. 28-36.)

(Note: Only Order No. 117 (Tr. 170) of the Public Service Commission, requiring repairs to be made to the existing viaduct, is now in controversy, Order No. 84, requiring a new viaduct to be constructed, having been repealed.)

Defendants filed answer to the rule to show cause why an interlocutory injunction should not be issued, in which answer the following allegations in the bill are denied:

- (1) That any street, road or roadway has ever been laid out, opened, dedicated, or granted the State of Louisiana, the City of New Orleans, or any other political subdivision of said State, or by the public or by any firm or corporation.
- (2) That the order in controversy is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for any of the reasons set forth in the Bill of Complaint, and particularly for any of the reasons set forth hereinabove as stated in paragraph Fourteen, page 7, of the Bill of Complaint.
- (3) That the cost of constructing a new viaduct would exceed \$150,000.00, or that the cost of repairing the existing viaduct would exceed \$49,000.00. (Sup. Ans. Tr. 165.)
- (4) That the penalties for violating the order of the Commission are excessive.
- (5) That the Court has jurisdiction to issue the interlocutory injunction as prayed for.

The defendants admit the following allegations in the Bill of Complaint:

- (6) That the plaintiff, the Morgan's Louisiana & Texas Railroad & Steamship Company, is a corporation organized and existing under and by virtue of Act No. 37 of 1877 of the General Assembly of the State of Louisiana, having its domicile in the City of New Orleans, Louisiana.
- (7) That the Louisiana Public Service Commission was created, organized and exists under and by virtue of certain provisions of the Constitution of the State of Louisiana of 1921, and is domiciled at Baton Rouge, Louisiana, and is composed of Huey P. Long, Chairman,

and Shelby Taylor and Francis Williams, Commissioners.

(8) The citizenship and official positions of Adolph V. Coco, Attorney General of Louisiana, and the Assistant Attorney General of Louisiana are admitted.

(10) The citizenship of Huey P. Long, Shelby Taylor, and Francis Williams, the Chairman and members of said Commission, is admitted.

(11) They admit that the plaintiff is now and has been since its organization engaged in operating a railroad within the State of Louisiana, connecting with other railroads extending into other states of the United States and foreign countries, and that plaintiff is a common carrier of passengers and freight within the State of Louisiana.

(12) On information and belief, they admit that on April 9, 1878, plaintiff acquired from Charles Morgan the property described in paragraph 4 of the complaint in the manner described therein. They admit that such property so acquired is now and for many years has been under the sole and exclusive control and possession of the plaintiff, which property is owned by plaintiff in fee simple.

(13) They admit that said tract of land, together with land adjacent thereto, is now being used and has been used by plaintiff since April 9, 1878, as the site for its shops, shop yards, railroad yards and terminals, and that plaintiff has constructed, maintained and operated thereon and is now maintaining and operating thereon shops, shop yards, railroad yards, railroad depot, and other terminal facilities, including a large number of railroad tracks, switches, cross-overs, and such other facilities as are customarily found in and are necessary for use in connection with the maintenance and operation thereof, and that the use and operation by petitioner of said shops, shop yards, railroad yards, and terminals are necessary to enable petitioner properly to serve the public and to carry on its business as a common carrier.

(14) They neither admitted nor denied the allegations in paragraph 7 of the bill of complaint, to-wit: That heretofore the City of New Orleans desired to obtain the right to cross with a viaduct said tract of land between the prolongation of the side lines of Newton

Street, which street runs at right angles to the side lines of said tract of land, and plaintiff granted to the City of New Orleans said right under the condition that the city would, among other things, construct and maintain said viaduct at its own expense, which grant was accepted by the City of New Orleans under Ordinance No. 2906, New Council Series, adopted by the Council of the City of New Orleans, February 28, 1905, approved March 1, 1906, although for the purpose of this answer to the rule, plaintiff admits that the said ordinance was adopted as shown by Exhibit "A" to the bill of complaint, but alleges that all of the same, together with the allegations in paragraph 7 of the bill of complaint, are irrelevant and immaterial to the issues involved in this case.

(15) They admit that the viaduct referred to in the said Ordinance No. 2906, New Council Series, was constructed across the said tract of land in accordance with said grant and was completed in about the year 1907, and has ever since been used as a means of crossing petitioner's said tract of land along the prolongation of the side lines of Newton Street, but defendants allege that the said viaduct has been condemned by the city authorities of the City of New Orleans, and is not now being used by all classes of traffic.

(16) They admit that, pending negotiations between the petitioner and the City of New Orleans relative to the City of New Orleans acquiring the right to cross the said tract of land with a viaduct, the City of New Orleans, by ordinance caused to be advertised, the saleable franchise to run for fifty (50) years, for the construction, operation and maintenance of a street railroad in that portion of the City of New Orleans known as Algiers.

(17) They admit that the ordinances attached to the bill of complaint, marked Exhibits "B," "C," "D" and "E," set forth the terms upon which the purchaser of the franchise was to secure the same, but they allege that none of the ordinances and the franchise are relevant or material to the issues in the case. They admit that street railroad tracks were constructed on said viaduct by the said Algiers Railway & Lighting Company, and that the said company operated its street railroad cars on said viaduct over and across said tract of land

until the said viaduct became unsafe for the operation of said street cars.

(18) They neither admit nor deny that the City of New Orleans has recognized its obligation to maintain said viaduct, but they aver that even if such be the fact, that it is neither relevant nor material to the issues in this case.

(19) They neither admit nor deny that the South New Orleans Light & Traction Company has recognized its obligation to the City of New Orleans to maintain said viaduct by making at various times and from time to time during the last five years repairs thereto, but they aver that the said viaduct has not been maintained in a safe and proper manner, and that in so far as the alleged obligation of the South New Orleans Light & Traction Company to the City of New Orleans is concerned to maintain said viaduct, it is neither relevant nor material to the issues of this case.

(20) They admit that on November 11, 1922, the Louisiana Public Service Commission adopted the order as set forth in paragraph 13 of the bill of complaint, and that an application for a new trial was denied.

All other specific allegations of the bill of complaint which are not herein admitted were denied. (Tr. 28-36.)

The supplemental and amendatory bill raises no new or additional issues, but the supplemental answer denies that the order finally adopted by the Commission is in any manner beyond its powers, or illegal, in that it only requires that necessary repairs be made to the existing viaduct, which had been condemned by the City of New Orleans as unsafe.

SUMMARY.

The basic questions to be decided by the Court are:

(1) Whether the Louisiana Public Service Commission has exclusive jurisdiction over the subject in controversy.

(2) Has the jurisdiction of that Commission been properly exercised?

(3) Has there been an adequate hearing before the Commission?

(4) Does the order of the Commission violate the Constitution and laws of the United States by depriving petitioner of its property without due process of law?

(5) Does the said order impair the obligation of the contract entered into by the City of New Orleans and the Morgan's Louisiana & Texas Railroad & Steamship Company?

The other issues as above set forth in the detailed statement of the pleadings are collateral to the main issues.

All pertinent issues are discussed under appropriate headings.

PROCEEDINGS BEFORE THE LOUISIANA PUBLIC SERVICE COMMISSION.

The case before the Louisiana Public Service Commission in which the order was entered is entitled: "Residents of Fifth District of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company, in re Newton Street Viaduct, Docket No. 165, Louisiana Public Service Commission."

A formal complaint was filed with the Commission by residents of the Fifth District of the City of New Orleans for the purpose of requiring the Morgan's Company to immediately proceed to reconstruct, repair and maintain the Newton Street viaduct over its tracks in Algiers.

Copies of the complaint were served in the usual manner upon the defendant, and after the usual delays hearings were

held in the City of New Orleans, after notice to the plaintiff company.

The Commission adopted on September 23, 1922, the following resolution:

“Resolved, that Francis Williams, Commissioner, be, and he is hereby, authorized, empowered and appointed for and in behalf of the Louisiana Public Service Commission, to conduct an investigation and hear testimony and to have said testimony reduced to writing, and thereafter to report to this Commission, with his recommendations and findings, for such action as the Commission may find proper and necessary, in the City of New Orleans, at such time and place as may hereafter be designated, and to continue said investigation from day to day as may appear necessary, in the following case on the docket of the Louisiana Public Service Commission: Residents of the Fifth District of New Orleans vs. Morgan's Louisiana & Texas Railroad & Steamship Company, in re repairing of Newton Street Viaduct, No. 165.” (Tr. 142.)

Hearings were held in the City of New Orleans, after due notice, on October 4, 1922; October 13, 1922; November 3, 1922, and November 6, 1922. (Tr. 61, 104.) At each of these hearings, the Morgan's Louisiana & Texas Railroad & Steamship Company was represented by counsel, who participated in the hearing, cross-examined witnesses, and introduced evidence on behalf of said company. In addition to oral testimony introduced, voluminous documentary evidence was filed with the Commission. After the oral testimony was transcribed, a copy of the evidence was furnished to each of the Commissioners and the entire Commission passed upon its final order. (Tr. 149, 150.)

The evidence before the Public Service Commission showed that some years ago a viaduct was constructed by the City of

New Orleans across the Morgan's Louisiana & Texas Railroad & Steamship Company's tracks on the strip of land referred to in the bill of complaint, connecting the two ends of Newton Street, which viaduct has been used continuously since its construction for vehicular traffic, including street car traffic, until the structure became so unsafe and dangerous as to render its use hazardous and unsafe, and the structure was condemned. Owing to disputes between the Morgan's Louisiana & Texas Railroad & Steamship Company, the City of New Orleans and the South New Orleans Light & Traction Company, as to who was liable for the proper maintenance of the present viaduct, all repair work was discontinued several years ago, and the viaduct was permitted to fall into a state of dilapidation.

A transcript of the proceedings before the Public Service Commission, including the evidence offered, was filed in the District Court and is reproduced in full in the printed Transcript of Record here. (Tr. 61-129.)

There is no dispute in this evidence over the fact that the Newton Street viaduct is in a dangerous and unsafe condition. The evidence on that point is conclusive, as shown by the following extracts from the evidence adduced before the Commission:

"Mr. Chaffe: Mr. Lewis, the Newton Street viaduct is in existence there today, is it not? It is physically there, whether in an unsuitable condition or not?

Mr. Lewis: Oh, yes; it is there, all right."

"Mr. Chaffe: And if the present Newton Street viaduct were in repair today and had been kept in repair, there would be no necessity for any other viaduct, or any other method of crossing there, would there?

Mr. Lewis: No, sir, because you would have a means of crossing then." (Tr. 66-67.)

* * * * *

"Mr. Kohn: Then the Newton Street viaduct appears to be necessary to your convenience and the convenience of the other people who reside in that neighborhood?

Mr. Hofstetter: Yes, sir; it is positively necessary to have that viaduct at Newton Street opened up and put in repair." (Tr. 68.)

* * * * *

"Mr. Chaffe: As a matter of fact, Doctor, if the Newton Street viaduct were in repair today and were kept in repair, there would not be any necessity for any other viaduct, as far as you know, would there?

Dr. Odon'dall: As far as the operations of the hospital are concerned, I cannot say why there should be. I speak, of course, only from the viewpoint of the operations of the hospital. I cannot speak for the other people of the vicinity. The only interest we have in it is for the transportation of our personnel to and from the ferry landing.

Mr. Chaffe: And the Newton Street viaduct serves all these purposes?

Dr. Odon'dall: It did up to the time it got out of repair and in such condition that it could not be used." (Tr. 71.)

* * * * *

"Mr. Chaffe: How long has the Newton Street viaduct been closed?

Mr. Norman: It has been absolutely closed during only the past two weeks or so, I believe.

Mr. Chaffe: Well, how long has it been partially closed?

Mr. Norman: Possibly for eight or ten months.

Mr. Chaffe: When you say partially closed, what do you mean?

Mr. Norman: I mean that there was a notice posted up there by the railway company and that they would not be responsible for any damage caused by anyone getting hurt in attempting to cross over this viaduct for the reason that it had been condemned and ordered closed by the city. However, in spite of that fact, I, and the balance of the people living across the viaduct, due

to the inconvenience of the Patterson Street route, continued to use the Newton Street viaduct and assume the risk." (Tr. 75-76.)

* * * * *

"Mr. Chaffe: Then we will put it another way; as far as your personal use is concerned, or the use of the people living below the viaduct is concerned, the Newton Street viaduct when in repair amply meets your needs and requirements, does it not?

Mr. Norman: I would say for the present that it would answer our purposes." (Tr. 78.)

* * * * *

"Mr. Lawton: I consider that the Newton Street viaduct should be repaired and put in first class condition, and that there should be several surface streets opened besides that—there should be one on the rear to give the people of Oakdale subdivision, for instance, a chance to get through somewhere without having to come way up to the front. There should be a street opened to give these people another way of getting out, and to permit the handling of heavy machinery and stuff like that, as I stated." (Tr. 81-82.)

Letters from the Bridge and Building Supervisor of the Southern Pacific Lines, dated November 11, 1921, and December 14, 1921, addressed to the South New Orleans Light & Traction Company were filed in evidence before the Commission. (Tr. 93.) The letters are as follows:

"Algiers, Louisiana, November 11, 1921.
South New Orleans Light & Transportation Company,
Algiers, Louisiana.

Gentlemen:

I beg to advise that the steel on the Newton Street viaduct is in very bad condition, a good many steel columns, which are the main supports of the viaduct, are rusted through.

This matter should be given your immediate attention, as this viaduct is very dangerous in its present condition.

Yours truly,

E. J. Legendre,
B. and B. Supr."

"Algiers, Louisiana, December 14, 1921.
South New Orleans Light & Traction Company,
Algiers, Louisiana.

Dear Sirs:

Please refer to my letter of November 11, in which I advise you of the condition of the Newton Street viaduct. I am again writing you to call your attention to the condition of this viaduct, as same have been neglected so badly that it is getting unsafe for traffic, due to the fact that the iron has been eaten through in several places by rust.

I will be glad to go over this viaduct with your representative and show him the bad spots that exist in this viaduct. Firmly trusting that you will give this matter your prompt attention, I am,

Yours truly,

E. J. Legendre,

B. and O. Supr."

Mr. Legendre is the supervisor of buildings and bridges of the New Orleans Division of the Morgan's Louisiana & Texas Railroad & Steamship Company. (Tr. 119.)

DESCRIPTION OF THE NEWTON STREET VIADUCT.

The Newton Street viaduct is described in the testimony of Mr. E. W. Burgess, president and general manager of the South New Orleans Light & Traction Company as follows:

The Newton Street viaduct extends from the east side of Elmira Avenue to the west side of Whitney Avenue, a distance of 1977 feet.

It is located on and over Newton Street, and was built for the purpose of carrying Newton Street across the property and over the 22 tracks of the Morgan's Louisiana & Texas Railroad.

It consists of a long steel trestle, with earth-filled, concrete, inclined approaches at each end of the steel trestle.

The approach at the west end (Elmira Avenue end) is 259 ft. 6 inches long; the steel trestle is 1493 ft. 6 inches long; and the approach at the east end (Whitney Avenue end) is 224 feet long.

Provision is made, throughout the entire length of the structure, for a highway for vehicles and street car line having a width of 28 feet, and for a sidewalk for pedestrians, on each side of the highway, each having a width of 7 feet, a total width, including sidewalks and driveway, of 42 feet.

A street car track is laid in the highway, the center of the track being located 7 feet from the center line of the viaduct toward the south side.

The surface of the track rails is at the same elevation as the surface of the highway on the steel trestle portion and also on the approaches, that is to say, the rails are flush with the driveway surface.

The inclined approaches for highway and sidewalks are built upon an earth fill which is held between concrete retaining walls, and they terminate at concrete abutment walls which abutment walls furnish support to the first and last spans of the steel trestle.

The highway on the approaches is surfaced with gravel and shells, including the portion occupied by the street car track. The sidewalks on the approaches being cement paved, for a distance extending from the street intersection at each end of the viaduct to the abutment walls.

On the steel trestle portion, the pavement, or decking, of both highway and sidewalks, is of wood planking, nailed to wooden stringers, which stringers are bolted to the steel floor system.

The approaches are in good condition, as regards both the highway and sidewalks. The steel trestle is much deteriorated in numerous places and in some places it is in such bad condition as to be unfit for use and dangerous.

The steel trestle consists of 61 spans, ranging in length from 14 feet to 66 feet. These spans are supported by 60 steel bents, each having 3 steel posts or columns.

In clear height, above the ground and above the steam road tracks, the steel spans range from a height of about 10 feet at the abutment walls to a clear height of 22 feet in the portion crossing over tracks of the M. L. & T. R. R., the high level portion being 413 feet long.

The 180 steel posts or columns are of built-up construction, some being of "I" beam with cover plate type, and some are of lattice construction.

The steel span girders also differ in design, some being of "I" beam type, others are plate and angle girders, and others are latticed.

The steel floor beams and stringers also vary in type and dimensions, on the spans of differing lengths, some being "I" beams, some channels, some latticed, and some built-up troughs.

In some parts the bridge is of flush deck construction, and in other parts there are "through" spans in which the deck is carried below the top of the main span girders.

On the outer side of each sidewalk there is a pipe-work hand railing.

The grades of the highway and sidewalks are as follows:

From the foot of the west approach to the abutment wall, a distance of 259 ft. 6 in., the ascending grade is 3.886 per cent.

From the west end of the steel trestle at the abutment, and for a distance of 472 ft. 6 in., the grade continues at 3.886 per cent.

For the next 175 ft. 4 in. to the east side of Verrett Avenue, the grade is 1.00 per cent.

From the east side of Verrett Avenue, for a distance of 377 ft. 8 in., the highway and sidewalks are level.

The descending grade starts at a point 14 feet west of the west side of Thayer Avenue, and is carried for a distance of 468 feet on the steel trestle at a grade of 3.876 per cent.

On the east approach, from the abutment wall to Whitney Avenue, the descending grade is 224 feet long and at a grade of 3.876 per cent. (Tr. 84, 85, 86, 87, 88, 89, et seq.)

**THE COMMISSION HAD THE POWER AND AUTHORITY
TO ISSUE AND ENFORCE THE ORDER
IN CONTROVERSY.**

The powers and duties of the Louisiana Public Service Commission are set forth in Article VI, Section 4, Constitution of the State of Louisiana of 1921, as follows:

"The Commission shall have and exercise all necessary power and authority to *supervise, govern, regulate and control all common carrier railroads*, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts." (Our italics.)

Thus the powers and duties of the Louisiana Public Service Commission are embodied in the organic law of the State. To

this Commission is entrusted the all-embracing power and authority "to supervise, govern, regulate, and control all common carrier railroads" operating in the State of Louisiana. The power, authority, and duties of the Commission "*affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers*" subject to its supervision, regulation, and control.

There can be no question that the Commission, as the law of Louisiana now stands, is the exclusive tribunal created by the Constitution of the State of Louisiana for settling matters of dispute arising between the public and the common carriers, in so far as its operations in the state are concerned, and that it has the power to require overhead crossings to be built by railroads to carry highways over their tracks.

This question has been directly settled by the Supreme Court of the State of Louisiana in the case of *Gulf, C. & S. F. R. Co., et al., vs. Louisiana Public Service Commission*, 151 La. 635, 92 Sou. 143. This case involved the right of the Louisiana Public Service Commission to require the Gulf, Colorado & Santa Fe Railway Company to build an overhead highway crossing its tracks in western Louisiana near the town of DeRidder. The Court in sustaining the order of the Commission said:

"To hold that the words 'supervise, govern, regulate and control' refer only to the relations existing only between railroads, on the one side, and shippers and passengers, on the other, as we understand plaintiff's contention to be, would, in our opinion, restrict the power and authority of the Commission within unreasonable limits and affect its efficiency to an extent never intended by the Constitution."

It has been repeatedly held that a state has power to require a railroad company to maintain, at its own expense, suitable crossings by bridges, viaducts or otherwise over roads which it crosses and which were laid out at the time of its construction.

22 R. C. L. 785;

Vandalia R. Co. vs. State, 166 Ind. 219; 76 N. E. 980, 117 A. S. R. 370;

State vs. District Ct., 42 Minn. 247; 44 N. W. 7; 7 L. R. A. 121;

State vs. St. Paul, etc., R. Co., 98 Minn. 380; 108 N. W. 261; 120 A. S. R. 581; 8 Ann. Cas. 1047; 28 L. R. A. (N. S.) 298;

Note L. R. A. 1915-E 751.

The great weight of authority sustains the validity of state requirements in the exercise of the police power compelling a railroad company, without compensation, to construct and maintain suitable crossings at streets extending over the right of way subsequent to the construction of the railroad.

Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979;

Northern Pacific R. Co. vs. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630;

Cincinnati, etc., R. Co. vs. Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060; 20 Ann. Cas. 1206 and note;

Chicago, etc., R. Co. vs. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671;

Missouri Pacific R. Co. vs. Omaha, 235 U. S. 121, 35 Sup. Ct. 82; 59 L. ed. 157;

Cleveland vs. Augusta, 102 Ga. 233; 29 S. E. 584; 43 L. R. A. 638;

Vandalia R. Co. vs. State, 166 Ind. 219; 76 N. E. 980; 117 A. S. R. 370;

Portland, etc., R. Co. vs. Deering, 78 Maine 61; 2 Atl. 670; 57 Am. Rep. 748;

State vs. St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261, 120 A. S. R. 581, and note; 8 Ann. Cas. 1047, and note; 28 L. R. A. (N. S.), and note;

Houston, etc., R. Co. vs. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

The above authorities hold that the state's action requiring suitable crossings to be built over a railroad is valid whether the crossing is at grade or below or above the tracks.

In *Missouri Pacific R. Co. vs. Omaha*, *supra*, the Supreme Court, speaking through *Justice Day*, said:

"That a railway company may be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court."

In *Chicago, Milwaukee & St. Paul R. Co. vs. Minneapolis*, *supra*, the Supreme Court, through *Justice Hughes*, said:

"It is well settled that railroad corporations may be required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out, over their tracks, or to carry their tracks over such highways." (A long list of supporting cases is cited in the opinion.)

In the light of these decisions, there should be no doubt of the validity of the contested order in the case unless for some reason, beyond a proper exercise of the police power, the order is found to be invalid.

THE ORDER OF THE COMMISSION IS PRIMA FACIE
REASONABLE.

The order was made on substantial evidence (Tr. 61-129), and is not the result of arbitrary conjecture. It is therefore *prima facie* fair and valid.

Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co., 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577;

Seaboard Air Line Ry. Co. vs. Railroad Commission, 240 U. S. 324, 36 Sup. Ct. 260, 60 L. ed. 669;

Minneapolis, etc., R. Co. vs. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821;

College Arms Hotel vs. Atl. Coast Line R. Co., 61 Fla. 550, 54 So. 459;

M. L. & T. R. R. & S. S. Co. vs. Railroad Commission, 109 La. 247, 33 So. 214;

Cumberland Tel. & Tel. Co. vs. Louisiana Public Service Commission, decided July 25, 1922, by Circuit Judge Bryan, and District Judges Clayton and Foster, 283 Fed. 215.

Bush, Receiver, St. L., I. M. & S. Ry. Co. vs. La. Pub. Service Com., 290 Fed. 1008.

Thompson vs. Railroad Commission of Louisiana, 198 Fed. 339.

There are many decisions on the same point, but this doctrine is so firmly established in the above cases as to make further citations unnecessary.

There is no contention made in the bill of complaint that the contested order is not based upon substantial evidence.

THE COMMISSION IS AUTHORIZED TO ADOPT ITS OWN MODE OF PROCEDURE.

Plaintiff attacks the Commission's order as violative of the Constitution of the State of Louisiana of 1921, Article VI, Section 3, and of the Fourteenth Amendment to the Constitution of the United States because "said order was rendered after a hearing at which only one member of said Commission was present, and without allowing petitioner to present argument though timely requested." As the entire Commission did hear argument before the last order was finally adopted, the objection that argument was not granted is groundless.

Article VI, Section 4, Constitution of Louisiana of 1921, among other things, provides that:

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations and *modes of procedure* as it may deem proper for the discharges of its duties," etc. (Our italics.)

Acting under the authority thus granted, the Commission, in session on September 23, 1922, delegated to one of its members, Commissioner Francis Williams, the authority and power to conduct the investigation in the case pending before it. (Tr. 142, *supra*.)

In accordance with this resolution, and without objection on

the part of the appellee, defendant before the Commission, the evidence was taken before Commissioner Williams. The testimony was subsequently reduced to writing and a copy furnished each member of the Commission who had not attended the hearing, and each Commissioner voted on the order after considering the evidence and hearing argument. (Tr. 149, 150.)

The order was therefore adopted in accordance with the provisions of Article VI, Section 2, of the Constitution of 1921, which, among other things, provides that:

"The act of two members when in session shall be the act of the Commission."

The authority given the Commission in the Louisiana Constitution to adopt its own mode of procedure, leaves to the Commission entire control over the manner in which its investigations shall be conducted.

In the case of *Standard Oil Company vs. Louisiana Public Service Commission*, 153 La. . . ., decided July 11, 1923, the Supreme Court of Louisiana said:

"It must be borne in mind that the nature and powers of this Commission under the Constitution and laws are quite broad. Its functions are many-sided. . . . Its procedure is necessarily more or less informal, since it has power 'to adopt and enforce such reasonable rules, regulations and modes of procedure as it may deem proper for the discharge of its duties', " etc.

The appellee was accorded a hearing, at which it introduced its evidence, and upon this evidence the Public Service Commission rendered its order.

THE GREAT WEIGHT OF AUTHORITY SUSTAINS THE VALIDITY OF ORDERS MADE BY COMPETENT STATE AUTHORITIES REQUIRING RAILROADS TO BUILD AND MAINTAIN, WITHOUT COMPENSATION, SUITABLE CROSSINGS AT STREETS OR ROADS EXTENDING OVER THEIR RIGHTS OF WAY, SUBSEQUENT TO THE CONSTRUCTION OF THE RAILROAD.

This is familiar jurisprudence. Before stating the authorities, we direct the Court's attention to the situation presented in Algiers, which was the subject of controversy before the Commission resulting in the order now contested. A large section of property running directly through the center of Algiers, which constitutes the Fifth Municipal District of the municipality of New Orleans, is owned by the Morgan's Louisiana & Texas Railroad & Steamship Company. The streets of Algiers begin and end on either side of this strip of land. They *touch* appellee's property. There is no way of getting from one to the other of these two separated sections of the city in a convenient and safe manner except by an overhead crossing over the twenty-three railroad tracks of the Morgan company. A surface crossing would be so extremely hazardous to life and property as to render it unsafe at all times. The viaduct is a continuation of the two ends of Newton Street, which, according to the testimony of all of the witnesses for the complainants before the Commission, is the most convenient and available place for the location of a heavy traffic viaduct.

The Morgan's Louisiana & Texas Railroad & Steamship Company gave its consent to the extension of Newton Street across its property in Algiers. This is clearly set forth in *Ordinance No. 2906, New Council Series, City of New Orleans* (Tr.

14, 15), wherein the bid of William W. Bierce, Ltd., for the construction of a viaduct across the railroad company's property in the Fifth Municipal District of New Orleans (Algiers) was accepted.

Section 2 of the said ordinance contains the following stipulation:

"Section 2. That the said bid of William W. Bierce, Limited, is, however, accepted subject to the terms and conditions set forth in the letter dated New Orleans, La., January 25, 1905, addressed to the Honorable the Mayor and Council of the City of New Orleans, signed by E. B. Cushing, General Superintendent of the Morgan's Louisiana & Texas Railroad & Steamship Company, which said terms and conditions have been duly ratified by certified copy of a resolution of the Board of Directors of said Company of date February 7, 1905, annexed to said letter of E. B. Cushing, which said letter reads as follows: 'To the Honorable the Mayor and Council of the City of New Orleans: Gentlemen—Referring to Ordinance No. 2470, New Council Series, and to the proposed viaduct to be constructed over the property and tracks of the Morgan's Louisiana & Texas Railroad & Steamship Company along the line of extension of Newton Street in Algiers, I beg to say that the said company consents to the construction, location and maintenance of said viaduct by the City of New Orleans as shown by the plan hereto annexed and marked exhibit "A," upon the following conditions, viz: That there is to be a clearance of not less than 22 feet between the lowest part of this viaduct and the top of the rail of the company's said tracks crossed by the same, and that no part of the viaduct is to come within six feet of the rail of said tracks; that the contractor for the erection and construction of such viaduct shall so perform the work as not to interfere with the use and operation by the railroad company of its said tracks, or to endanger the safety of its employees; that the proposed arrangement of the said company's tracks is shown on said plan hereto attached and made part of this agreement, and the said viaduct is to conform to said tracks as shown on said plan, whether

the same be now constructed or not; and finally, that the said company shall have the right, at any time, at its expense, to make such changes in the location of the piers or foundations of the viaduct as may be necessary in its opinion to accommodate the structure to any rearrangement of its tracks or change in the method of using its yards which it may hereafter adopt, provided such changes be made at the expense of the said company and without injury to the said viaduct. Upon these conditions the company consents to and grants to the City of New Orleans the right to construct and maintain permanently said viaduct across the company's said property. This letter, if satisfactory to the city, will be ratified by the directors of the Morgan's Louisiana & Texas Railroad & Steamship Company. Yours truly, E. B. Cushing, General Superintendent." (Tr. 15.)

Then follow certain specifications, as to clearance, manner of performing the work, and the right of the Morgan Company "at any time, at its expense, to make such changes in the location of the piers or foundations of the viaduct as may be necessary, in its opinion, to accommodate the structure to any arrangement of its tracks or change in the method of using its yards which it may hereafter adopt, provided such changes be made at the expense of the said company and without injury to said viaduct."

Upon the conditions set forth in the Ordinance the Morgan's Company "consents to and grants to the City of New Orleans the right to construct and maintain permanently said viaduct across the company's said property."

The contract price for building the viaduct was \$54,760.00, which was paid by the City of New Orleans.

In the opinion of the lower court, the following language is used:

"The facts material to a decision in this case are these: The plaintiff for forty years has owned in fee simple, and has had in its possession, a strip of land in the City of New Orleans in the 5th District, known as Algiers, measuring 325 feet front on the Mississippi River by 24 arpents in depth, approximately 3600 feet. This strip and adjacent land subsequently acquired is fenced and is occupied as a railroad yard, contains some 20-odd tracks, round houses and machine shops. No streets have ever been opened across the property, the streets at right angles on both sides stopping at the fence. Crossing the property at Patterson Street, just back of the levee of the Mississippi River, is a viaduct for vehicular and foot passage. Another viaduct, for foot passage only, crosses the property at Eliza Street, the third street back from the river. *Five streets still further back at Newton Street, another viaduct crosses the property. These are the only rights of way that have ever been granted the public.* The Newton Street viaduct is about 200 feet long and occupies a portion of Newton Street on each side of plaintiff's property. It was constructed in 1907 pursuant to an agreement, incorporated in various ordinances, between the plaintiff, the City of New Orleans, and the Algiers Railway & Lighting Company, a corporation operating a street car system in Algiers and over the viaduct. The contract and its subsequent modifications provide for the payment by the City of the cost of erecting the viaduct and for the maintenance of same thereafter by the street railway company. At the present time the viaduct is much in need of repair and, while passable for pedestrians, is not sufficiently strong to permit the operation of street cars over its entire length. The order sought to be enjoined relates to this viaduct." (Our italics.)

The lower court, therefore, refers to the Algiers or Newton Street viaduct as *a right of way granted to the public*. It can be nothing less, for the public has used the viaduct as a crossing since 1907, without objection from the Morgan's Louisiana & Texas Railroad. The City of New Orleans paid for the original

structure. The question now is at whose expense must it be repaired?

The following are some of the leading cases dealing with the right of the state to open a highway through a railway company's property and require the railroad to build at its own expense a bridge over the highway.

In *Cincinnati, Indianapolis & Western Ry. Co. vs. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, the Supreme Court said:

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question, is, we think, concluded by former decisions of this court; particularly by *Chicago, etc., R. Co. vs. People*, 200 U. S. 562, 582, 584, 591, 4 Ann. Cas. 1175, 26 S. Ct. 341, 50 U. S. (L. ed.) 596; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 25 S. Ct. 491, 49 U. S. (L. ed.) 831; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 14 S. Ct. 437, 38 U. S. (L. ed.) 269; *Chicago, etc., R. Co. vs. Chicago*, 166 U. S. 226, 254, 17 S. Ct. 581, 41 U. S. (L. ed.) 979; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 U. S. (L. ed.) 336. See also *Union Bridge Co. vs. U. S.*, 204 U. S. 364, 27 S. Ct. 367, 51 U. S. (L. ed.) 523. The railway company accepted its franchise from the state subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all

persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore, etc., R. Co. v. Ohio*, 172 U. S. 285, 17 S. Ct. 465, 43 U. S. (L. ed.), 702, 20 Ann. Cas. 1208."

In *Chicago, Milwaukee & St. Paul R. Co. vs. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, the Supreme Court held that the expense of constructing and maintaining a necessary bridge over the gap in a railway right of way made by the municipal construction across it of a canal or waterway with footpaths on each side connecting two lakes used for public recreation, may be cast upon the railway company without denying it due process of law guaranteed by the Federal Constitution. *Justice Hughes*, who rendered the opinion for the court, said:

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (*Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Northern Pacific R. Co. v. Minnesota, ex rel Duluth*, 208 U. S. 582, 52 L. ed. 630, the Supreme Court, speaking through *Justice Day*, quoted at length the decision of the Supreme Court of Minnesota, under review, which, in part, is as follows:

"It cannot be supposed that, when its franchises

were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the state, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company, to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new state rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604; *Chicago & A. R. Co. v. Joliet L. & A. R. Co.*, 105 Ill. 388; 400, 404, 44 Am. Rep. 799; *Hannibal vs. Hannibal & St. J. R. Co.*, 49 Mo. 480; *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63."

The doctrine announced by the state court was approved by the Supreme Court of the United States, which, later in the opinion, said:

"As the Supreme Court of Minnesota points out in the opinion in 98 Minn. 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited in 98 Minn. 380.

There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with

reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 555, 38 L. ed. 269, 272, *Chief Justice Fuller* thus announced the doctrine:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of this community from injury. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1003; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468."

These authorities have settled the question of the right of the state to require railroad companies to build and maintain without compensation suitable crossings at streets or roads extended over the right of way subsequent to the construction of the railroad. If the state may compel a railroad company, as it undoubtedly may, to construct a suitable crossing at streets extended over its right of way after its construction, with equal certainty the state may compel a railroad company to repair a crossing already constructed. The greater power includes the lesser.

It will be contended, perhaps, by the appellee that no positive evidence has been introduced to show that either the State or the City has expropriated a street crossing over the strip of land referred to, but we do not think that this case can turn upon such a contention, even admitting for the sake of argument that that is true. The appellee has granted the public a right to cross its tracks from one part of Algiers to the other. It has recognized this by giving its consent to the city to build a viaduct. In no other way can the heavy traffic of Algiers get from one part of the city to the other without great inconvenience and in no other way can it safely cross the twenty-three tracks of the plaintiff company. The State in its sovereign capacity, through its duly authorized administrative board, the Public Service Commission, has unquestioned right to require a railroad to provide a safe and suitable crossing over these tracks.

In the *Gulf, Colorado & Santa Fe R. Co. vs. Louisiana Public Service Commission*, *supra*, the state highway near DeRidder was in an entirely new location. The state had never expropriated a right of way over the railroad company's tracks, but it was necessary in order to connect up the two ends of this highway that such a crossing should be provided, and the state commission ordered a suitable crossing, its order being upheld by the Supreme Court of the State of Louisiana.

THE ORDER OF THE PUBLIC SERVICE COMMISSION
DOES NOT IMPAIR THE OBLIGATION OF THE
CONTRACT BETWEEN THE CITY OF
NEW ORLEANS AND APPELLEE.

It will be contended by appellee that the order of the Commission requiring it to repair and put in a safe and suitable condition its existing viaduct across its tracks, facilities and properties in the Fifth District in the City of New Orleans, impairs and renders null and void and of no effect, the obligations of the City of New Orleans under the alleged contract existing between the said city and the Morgan's Company, under which the city acquired the right to cross said tracks, in violation of Section 10, Article I, of the Constitution of the United States.

If this contention were true, all of the police powers of the state would be subjugated to the power of a railroad corporation by a contract with a municipality to destroy the state's police power. Under the Constitution of Louisiana, the state's police power cannot be bartered away. The sovereign always maintains the power, in the interest of the comfort, convenience and safety of its citizens, through the exercise of the police power, to require structures to be built necessary to safeguard the rights of its citizens. Upon this well-established principle of law railroad companies have been required to elevate or depress their tracks over streets already in existence, or to meet the requirements of growing communities by providing safeguards where new streets or roads may be laid out. In exercising the police power in such a manner as to afford a safe crossing over yard tracks and main

lines of railroads the State is but insisting upon its sovereign right.

We have shown this question has also been frequently presented to this Honorable Court, and the Court has, by an unbroken line of decisions, upheld the state's authority in such matters. Likewise it has been held that contracts entered into by private corporations are not impaired when abrogated by a proper exercise of the police power.

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 555, 38 L. ed. 269, Chief Justice Fuller, delivering the opinion, cited numerous cases, and laid down the following fundamental rule to be followed in cases of this character:

"The conclusions of this court have been repeatedly announced to the effect that, though railroad corporations are private corporations as distinguished from those created for municipal and government purposes, their uses are public, and they are vested with the right of eminent domain, only to be exercised for public purposes; that, therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injury, and oppressions; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious." (151 U. S. 571.)

In *Woodruff vs. Catlin*, 54 Conn. 277 (a case cited by Chief Justice Fuller in 151 U. S. 555, *supra*), the court, speaking of a

Connecticut statute similar to the order of the Commission in this case, said:

"The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the government power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance, dangerous to life, in the absence of action on the part of either the city or the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such a manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part, or by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

That an ordinance requiring a railroad company to provide at its expense, a safe and suitable viaduct within a municipality is not an impairment of a franchise contract of the city to maintain the viaduct at its own expense, was directly passed upon in the case of *Northern Pacific Ry. Co. vs. Minnesota, supra*.

The Lake Superior & Mississippi Railroad in 1869 laid its first track across what is now Lake Avenue in the City of Duluth. Lake Avenue was graded and improved for public traffic in the winter and spring of 1871, since when it had been in continuous use as a public street. In the year 1891 the amount of business on Lake Avenue and the number of tracks therein had become so great that the constant passage of cars and engines endangered

the safety of the public. The City of Duluth thereupon prepared plans and specifications for the construction of a viaduct on Lake Avenue and made a demand upon the railroad company to construct the same. The railroad company, after considerable negotiation, in which it denied its obligation to build the viaduct, entered into a contract with the City of Duluth, which was set up in its answer as a full defense to the right of the City of Duluth to require the repair of the viaduct at the railroad company's expense. *The contract provided that the city should build the bridge or viaduct upon Lake Avenue to carry that street over the railroad tracks which had theretofore crossed said avenue at grade. The railroad company was to contribute to the expense of the construction, and the city undertook for the period of fifteen years to maintain the part of the bridge over the railroad's right of way and to properly maintain the approaches.*

In 1903 the viaduct and its approaches having become dangerous for public use, the City of Duluth, acting within the power conferred upon it by law to require railroad companies to construct bridges and viaducts at their own expense at public railroad crossings, and having been investigating the subject, approved plans presented by the city engineer and passed a resolution requiring the Northern Pacific Railway Company to make repairs as set forth in the specifications as necessary and proper and as demanded by public safety and convenience.

The Northern Pacific Railway Company brought suit in the state court of Minnesota to have the ordinance set aside. The case was brought to the Supreme Court of the United States to review a judgment of the county court compelling the railroad

company by mandamus to repair the viaduct carrying a city street over its tracks, and this in the face of the contract which had previously been made by the City of Duluth with the railroad company.

Justice Day, who delivered the opinion of the court, said:

"We are met at the threshold with the question of the jurisdiction of this court. It is the contention of the plaintiff in error that in requiring the railroad company to repair the viaduct at its own expense, the obligation of the contract of September 2, 1891, has been impaired by legislation of the municipal corporation, in violation of the contract clause of the Constitution of the United States."

The court after making numerous observations upholding the validity of the ordinance requiring repairs to be made to the viaduct at the expense of the railroad company, and disregarding the former ordinance under which the City of Duluth contracted to make certain of these repairs at its own expense, concludes by saying:

"But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest as it is beyond the authority of the municipality to abrogate this power so necessary to the public safety. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513."

This doctrine was approved in *Missouri Pacific Railway Company vs. Omaha*, *supra*; *Russell vs. Sebastian*, 233 U. S. 202, 58 L. ed. 920; *Chicago Ry. Co. vs. Minneapolis*, 232 U. S. 438, 58 L. ed. 674; *Atlantic Coast Line R. Co. vs. Goldsboro*, 232 U. S. 560, 58 L. ed. 727; *Louisville, etc., R. Co. vs. Garrett*, 231 U. S. 318, 58 L. ed. 245; *Grand Trunk Western Ry. Co. vs. Rail-*

road Commission, 221 U. S. 403, 55 L. ed. 787, and numerous other cases cited in these authorities.

In the case of *Grand Trunk Western Ry. Co. vs. Railroad Commission, supra*, it was held that a contract between two railroads for bearing the expense of crossing and guarding the crossing with semaphores is not impaired by order of the state commission requiring an interlocking system to be installed and apportioning the expense in a different manner.

The overhead crossing, or viaduct, connecting the two ends of Newton Street in Algiers has been used by the public for a traffic bridge over the tracks of the plaintiff railroad for more than fifteen years. It is necessary for the convenience, comfort and safety of the public in crossing the appellee's tracks, having been so recognized by appellee in its original contract with the City of New Orleans, under which the viaduct was built. Now that the state, through its public service commission, has, after a full investigation and in the interest of the public safety and convenience, ordered the plaintiff company to provide a safe and suitable viaduct, the contract with the City of New Orleans cannot stand in the way of the exercise by the state of its sovereign power.

The appellee appears to recognize this doctrine, by falling back upon the argument that, if any public authority has the power to require it to repair the Newton Street viaduct, it is the municipality of New Orleans and not the Louisiana Public Service Commission. This phase of the case deals with an interpretation of state laws, and is fully discussed in another portion of this brief.

THE SUPREME COURT OF LOUISIANA HAS UPHELD
THE POWER OF THE LOUISIANA PUBLIC SERVICE
COMMISSION TO FIX STREET CAR RATES IN DIS-
REGARD OF A MUNICIPAL CONTRACT NAMING
RATES.

In *City of Shreveport vs. Southwestern Gas & Electric Company, et al.*, 151 La. 864, 92 Sou. 365, the Supreme Court of Louisiana was called upon to pass upon the question whether the contract between the City of Shreveport and the Southwestern Gas & Electric Company, fixing rates for gas in the City of Shreveport, prevented the Louisiana Public Service Commission from fixing rates different from those fixed in the contract. As stated by the court:

"The question in the present case is not as to whether the city has not had heretofore the power to fix a gas rate by agreement with the gas company, or might do so now; but it is as to whether it has thus had, and now has, the power to impose a gas rate by compulsion."

The City of Shreveport brought suit against the Southwestern Gas & Electric Company and the Louisiana Public Service Commission to prevent certain increased rates authorized by the Commission from going into effect on the ground that the Commission had fixed gas rates for the City of Shreveport by ordinance and that the contract thus made was binding upon both the gas company and the City of Shreveport, and could not be disturbed by an order of the Commission. The court in discussing the contract says:

"Such a contract, we may mention in passing, may not be possible in this state in view of the constitutional

provision forbidding the abridgement of the police power."

We cite this case because it shows the attitude of the Supreme Court of Louisiana upon the question of the right of a municipality to make an inviolable contract with a public service corporation under the laws of the state.

In *Puget Sound Traction, L. & P. Co. vs. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, 37 Sup. Ct. Rep. 705, the court, through *Justice Pitney*, on a similar question, said:

"It is urged that the order impairs the obligation of the contracts contained in the franchise ordinances, both in regard to transfers and in regard to plaintiff's right to make rules for the management and operation of its lines. As to the latter point, the proviso that the rules 'shall not conflict with the laws of the state,' etc., by fair construction means the laws as they shall from time to time exist. The act establishing the Public Service Commission (Laws 1911, Chap. 117) and orders made by that commission are within the description; hence, the contract, if it be a contract, was subject to and is not impaired by the order in question.

Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power."

THE ALLEGED CONTRACT BETWEEN THE SOUTH
NEW ORLEANS LIGHT & TRACTION COMPANY AND
THE CITY OF NEW ORLEANS, UNDER WHICH THE
TRACTION COMPANY IS REQUIRED TO MAINTAIN
ALL PARTS OF THE VIADUCT CONSTRUCTED BY
THE CITY OF NEW ORLEANS IS FOREIGN TO THE
ISSUE IN THIS CASE, BUT IN ANY EVENT CAN-

NOT INTERFERE WITH THE EXERCISE OF THE POLICE POWER OF THE STATE THROUGH ITS PUBLIC SERVICE COMMISSION.

Another ground which will be urged as to the invalidity of the order in contest is that the order releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans to maintain all parts of the viaduct constructed by the City of New Orleans, and places upon the appellee the burden of repairing and putting in a safe condition the existing viaduct, in violation of Section 13, Article IV, of the Constitution of the State of Louisiana of 1921, and of the Fourteenth Amendment to the Constitution of the United States.

It is obvious that if the City of New Orleans cannot by a contract made with the Morgan's company preclude the Louisiana Public Service Commission from exercising the powers vested in it by the Constitution of Louisiana of 1921 "to supervise, govern, regulate and control" railroad companies operating in this state, that a contract made between the City of New Orleans and the South New Orleans Light & Traction Company could not foreclose the state from exercising its regulatory powers.

Admitting that a contract does exist between the South New Orleans Light & Traction Company and the City of New Orleans, under which the traction company obligated itself to maintain all parts of the viaduct as constructed by the City of New Orleans, it can have no bearing upon the validity of the order of the Commission requiring appellee to repair and put in a safe condition the existing viaduct. If the police power of the state

can thus be abrogated by a private contract, the police power of the state would cease to exist. It would soon be emasculated by countless contracts of a similar character, and thus the power of the state to regulate public service corporations would become a myth.

In *Union Dry Goods Company vs. Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, a private contract between the Georgia Public Service Corporation and the Union Dry Goods Company, both Georgia corporations, under which the former contracted to supply the latter with electric light and power at stipulated rates for a term of five years, was involved. The contract was performed for about two years, when the dry goods company refused to pay a bill for service rendered, in which a rate higher than that of the contract was charged. The service corporation claimed that the rate it sought to collect was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

The dry goods company thereafter began its suit to compel specific performance of its contract and to enjoin the service corporation from charging the higher rates as fixed by the state authority. Both the trial court and the Supreme Court of Georgia held against the claims of the dry goods company and the case was taken to the Supreme Court of the United States for review on writ of error. After asserting that the presumption of law is in favor of the validity of the order of the public service commission, the Supreme Court, through *Justice Clarke*, upheld the decision of the Georgia Supreme Court, and after

referring to a great number of decisions in point, in conclusion said:

These decisions, a few of many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed." *Union Dry Goods Co. vs. Georgia Pub. Ser. Com.*, 248 U. S. 372; 63 L. ed. 309.

An important decision referred to in the *Union Dry Goods Company* case, *supra*, is *Atlantic Coast Line R. Co. vs. Goldsboro*, 232 U. S. 548, from which the following excerpt is taken:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of over-riding the power of the state to establish all regulations as are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And, quoting again from *Manigault vs. Spring*, 199 U. S. 473, 480, 50 L. ed. 274, 278, the court says:

"It is the settled law of this court that the interdiction of statutes impairing the obligations of contracts does not prevent the state from (properly) exercising such powers * * * * * for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

The fact that the City of New Orleans made the contract with the South New Orleans Light & Traction Company does not remove it from the category of the cases cited, but if there were any doubt on the question of the right of the City of New Orleans to barter away the police power of the state by contract,

that doubt has been removed by the decision of the Supreme Court of Louisiana in *Shreveport vs. Southwestern Gas & Electric Company, supra*.

THE FACT THAT A VIADUCT EXISTS OVER APPELLEE'S TRACKS DOES NOT INVALIDATE THE COMMISSION'S ORDER, BUT EMPHASIZES THE ARGUMENT THAT AN ORDER REQUIRING A DANGEROUS VIADUCT TO BE REPAIRED IS A PROPER EXERCISE OF THE STATE'S POLICE POWER.

It is alleged in the bill of complaint, and admitted in the answer, that a viaduct already exists on the site designated in the order herein complained of, and in connection with the admission it is stated that such viaduct, "if maintained and kept in repair, as it should be, and should heretofore have been, as aforesaid, is, would be, and would continue to be for more than twenty years, amply sufficient to care for all traffic, foot, vehicular, street car, and all other kinds, across petitioner's said tract of land along the prolongation of the two sides of Newton Street," etc. (Tr. 5.)

The final order of the Louisiana Public Service Commission (Order No. 117, Tr. 170-171) required the appellee within fifteen days from the date of the order to

"commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans, within the limits of the said prop-

erty, which connect the two ends of Newton Street, thereafter to maintain the same in a safe and suitable condition."

There was no ordering of a street crossing, or a new viaduct, nor trespassing upon appellee's property. The viaduct was there. Its use had been granted to the public. By neglect it had become unsafe. In fact, at the time of the investigation by the Louisiana Public Service Commission it had been condemned by the City Engineer of the City of New Orleans. The City had repudiated its contract. The affidavit of Paul H. Maloney, Commissioner of Public Utilities of the City of New Orleans (Tr. 168) states:

"The fact is that the Commission Council of the City of New Orleans now has and for many months has had under consideration the matter of an adjustment of the legal situation with reference to and the repair of the Newton Street viaduct, but said Commission Council has not since December, 1920, agreed to repair or have kept in repair the approaches of the Newton Street viaduct or those of the Newton Street viaduct exclusive of the portion which extends over the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company or any other portion of said viaduct."

Life and property was endangered, and the Public Service Commission required that the existing structure be made safe for public use. This was clearly a proper exercise of the police power of the state.

The bill by plain inference shows that the viaduct is not in proper condition for use. Appellee's own officers testified before the Public Service Commission that they had warned the South New Orleans Light & Traction Company of the dangerous

condition of the viaduct. Proof is abundant in support of these assertions, and yet with this damaging admission on the part of plaintiff, the bill proceeds to attack the order as unreasonable and unjust, and therefore invalid. If no means of crossing safely the twenty-three tracks of the plaintiff company lying on its property which divides the District of Algiers into two parts had been provided, the Commission's power to require the plaintiff company to provide a safe and suitable crossing could not be successfully questioned. The fact that the present viaduct "if maintained and kept in repair as it should be and should heretofore have been," would suffice for many years to come, only emphasizes the need of action by the Public Service Commission. It is not necessary to wait until the viaduct actually falls in a crumbling mass before the Commission should exercise its power.

THE MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY IS OBLIGATED BY ITS CHARTER TO PRESERVE ANY STREET OR HIGHWAY WHICH ITS RAILWAY MAY PASS ALONG OR INTERSECT, TOUCH OR CROSS, SO AS NOT TO IMPAIR ITS USEFULNESS TO THE PUBLIC.

The Morgan's Louisiana & Texas Railroad & Steamship Company is a Louisiana corporation, holding a charter granted by the legislature of the State of Louisiana of 1877. Its powers and duties as set forth in its charter place upon the company certain obligations which are important in connection with its contention in this case that it is not obligated to provide a safe and suitable street crossing in Algiers.

The seventh section of the "*Act to incorporate the Morgan's Louisiana and Texas Railroad and Steamship Company, (Act No. 37 of the General Assembly of the State of Louisiana of 1877, approved March 8, 1877)*", provides that said corporation is authorized and empowered,

"To construct and maintain its said railroads, or any part of same, and to have the right of way therefor across or along or upon any waters, water course, river, lake, bay, inlet, street, highway, turnpike or canal, within the State of Louisiana, which course of said railways may intersect, *touch* or cross; provided the said company shall preserve any water course, street, highway, turnpike, or canal, which its said railways may pass upon, along, or intersect, *touch* or cross, so as not to impair its usefulness to the public unnecessarily, or if temporarily impaired, in and during the construction of the said railroads, the said company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily impaired or injured, and the said company shall not be required to construct a draw in any bridge over and across any stream or bayou, except streams navigable by enrolled and licensed vessels." (Our italics.)

The obligation was thus plainly placed by law upon the Morgan's Louisiana & Texas Railroad & Steamship Company to preserve any street, highway, or turnpike which its said railroad may intersect, *touch*, or cross, so as not to impair its usefulness to the public unnecessarily. To deny the public a safe and suitable crossing at Newton Street, a street *touched* by the said railroad, would unnecessarily impair the usefulness of that street to the public, and is in direct violation of the charter provision last above quoted.

A railroad company should be held to a faithful compliance with all the provisions of its charter.

In *Washington, Alex & Georgetown R. Co. vs. Brown*, 84 U. S. 409 (17 Wall 445), 21 L. ed. 675, the Court, *Justice Davis* rendering the opinion, said:

"It is the accepted doctrine of this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees."

This is elementary law, and emphasises our contention that the contract made by the City of New Orleans to build and *maintain* the Newton Street viaduct would be violative of fundamental rights of the public if it prevented the proper state authority from ordering the railroad company to make repairs to the viaduct which would make it safe.

THE COMMISSION'S ORDER DOES NOT REQUIRE APPELLEE TO MAKE USE OF THE CITY'S STREETS WITHOUT AUTHORITY.

The final order in controversy requires appellee to "repair and put in a safe and suitable condition for vehicular and other traffic" the "existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company," etc. There is a contention made in the bill of complaint, paragraph XIV, Section (f) (Tr. 7), that the order of the Public Service Commission "requires petitioner to make use of a part of the public streets of the City of New Orleans, jurisdiction over which is vested exclusively in said City," etc.

This may be true if the first order issued by the Commission is taken literally. (Order No. 84, Tr. 36.) Order No. 84 has, however, been rescinded, annulled and cancelled, and we are

now considering only the final order of the Commission, No. 117. (Tr. 170.) The last order of the Commission (No. 117) was issued on March 29, 1923, after the proceedings before the Commission had been reopened, and further hearing had. In this order, which is the only one now in issue, the only requirement, as before pointed out, is, that the Morgan Company shall *repair and put in a safe condition, the existing viaduct over, above, across the properties of said Morgan's Louisiana & Texas Railroad & Steamship Company, etc.*

In complying with this order appellee is not required to go beyond the limits of its own property. The approaches to the viaduct, which are partly in the city's streets, are not shown to be in need of repair.

The controversy as to Order No. 84 is now a moot question.

THERE IS NO CONFLICT BETWEEN POWERS VESTED IN THE LOUISIANA PUBLIC SERVICE COMMISSION AND THE COMMISSION COUNCIL OF THE CITY OF NEW ORLEANS, IN SO FAR AS THE ORDER IN CONTROVERSY IS CONCERNED.

In the opinion rendered by the district judge in this case, it is said:

"Analyzing the order complained of in this case, it is apparent the Commission is seeking to exercise control over the streets of New Orleans, as well as the power of eminent domain. Conceding that the police power can never be contracted away and that a railroad may be required to construct a crossing over a street or a public road, at its own expense, these principles do not apply to the taking of private property for public use. *It is true there is a viaduct already in existence, and the railroad has granted a right of way to the public over its*

property, but it has done so under certain conditions amounting to a contract." (Tr. 151.) (Our italics.)

This expression by the lower court is not in accord with the Constitution and laws of Louisiana, nor the decisions of the Supreme Court of the United States or the Supreme Court of Louisiana.

In *Northern Pacific R. Co. vs. Minnesota, ex rel. Duluth*, *supra*, the court, through *Justice Day*, held that the charter of the railroad company was held subject to the right of the state to impose upon the company the duty of providing necessary crossings at new highways.

In *Gulf, Colorado & Santa Fe R. Co. vs. Louisiana Public Service Commission*, 151 La. 635, *supra*, the Supreme Court of Louisiana held the words "*supervise, govern, regulate and control*," as used in Section 4, Article VI, of the Constitution of Louisiana of 1921, were intended to and did give that Commission power to require the Santa Fe Railway Company to construct an overhead highway crossing at a point where a new highway under construction intersected the railway.

The appellee apparently rested its case originally upon its contract with the City of New Orleans, now repudiated, under which it asserted that it was under no obligation to repair the Newton Street viaduct. It now takes the alternative position and contends that the final order of the Public Service Commission (Order No. 117, Tr. 170) is invalid because the authority to regulate steam railroads existed in the municipality at the time the Louisiana Public Service Commission was created, and, because of the conflict, and by reason of certain provisions of the

Constitution of Louisiana of 1921, the Public Service Commission had no authority to supervise, govern, regulate and control the Morgan's Louisiana & Texas Railroad within the corporate limits of the City of New Orleans.

A brief historical statement of the laws of Louisiana relative to the supervision, government and control of railroads operating within the state, and the comparative powers of the City of New Orleans, is necessary to give the court a clear conception of the absolute impossibility of conflict between the powers of the Louisiana Public Service Commission and the municipality of the City of New Orleans over the subject of the Commission's contested order.

The first attempt at regulation of railroads in Louisiana took place when the Constitution of 1898 was adopted. Under Articles 284 to 289, inclusive, of the Louisiana 1898 Constitution, a Railroad Commission was created and its powers and duties defined.

The powers and duties of the Railroad Commission of Louisiana are thus set forth in *Article 284 of the Louisiana Constitution of 1898*, viz:

"Art. 284. The power and authority is hereby vested in the commission, and it is hereby made its duty, to adopt, change, or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, steamboat and other water craft, sleeping car, express, telephone and telegraph lines of this State, and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or mes-

sages, for a shorter than a longer distance over the same line, unless authorized by the commission to do so in special cases; to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations, and to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction.

The Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure, as it may deem proper for the discharge of its duties, and to hear and determine complaints that may be made against the classification or rates it may establish, and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts, required or authorized by these provisions. The Commissioners shall have power to summon and compel the attendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under commission, and to punish for contempt as fully as is provided by law for the district courts."

The present charter of the City of New Orleans was granted long after the Constitution of 1898 was adopted, by *Act 159 of the General Assembly of the State of Louisiana of 1912*. As the powers and duties vested in and imposed upon the Railroad Commission of Louisiana were a part of the organic law of the state, specifically set out in the State Constitution, such powers could not, by legislative act, without an amendment to the State Constitution, be delegated to the municipal government.

Act No. 159 of the General Assembly of the State of Louisiana of 1912—the charter of the City of New Orleans—Sections 1 and 12, provide that:

"(d) The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intent thereof, that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed;

(e) The city shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city;

* * * * *

"12. To authorize the use of the streets for railroads operated by horse, electricity, steam or motive power, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turntable to compel them to keep conductors on their cars and compel all such companies to keep in repair the street bridges and crossings through or over which their cars run.

13. To establish jails, houses of refuge, reformation and correction and to make regulation for their government; to construct, maintain and operate belt railroads and other public utilities; and to exercise general police power in the City of New Orleans."

From the excerpt of the Louisiana Constitution of 1898, *supra*, it will be observed that the Railroad Commission of Louisiana was, at the time of the adoption of the city charter of New Orleans, vested with the power and authority "to govern and regulate railroad . . . freight and passenger tariffs and service . . . and to inspect railroads and require them to keep their tracks and bridges in a safe condition," etc.

The power and authority delegated to the City of New Orleans by Act No. 159 of 1912 of the General Assembly of Louisiana must be construed not to conflict with the plain provisions of the Constitution of 1898. Or, if the language in the charter of the City of New Orleans implies a conflict of authority

with the State Constitution, the conflict must be resolved in favor of the Railroad Commission of Louisiana, whose powers were derived by direct constitutional grant. It should not be supposed that the legislature of 1912 attempted to pass to the city government powers of regulation vested by the Constitution in a state commission.

The Railroad Commission of Louisiana existed from 1898 until June 30, 1921, when it was succeeded by the Louisiana Public Service Commission, created by the Constitution of the State of Louisiana of 1921. The powers and duties of the Louisiana Public Service Commission, as set forth in Article VI, Section 4, of the State Constitution of 1921, are as follows:

"Section 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts."

Section 7, Article VI, of the same Constitution provides:

"Section 7. Nothing in this article shall affect the powers of supervision, regulation and control over *any street railway, gas, electric light, heat, power, water works, or other local public utility*, now vested in any town, city, or parish government unless and until at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors of such town, city, or parish, voting thereon, shall vote to surrender such powers." (The remainder of the section is immaterial to the issue here involved.) (Our italics.)

It is plain from the above language in the Constitution of Louisiana that no powers of supervision, regulation and control over *steam* railroad were reserved to any municipality of the state.

The language of the State Constitution leaves nothing in doubt. It specifically mentions "*street railway, gas, electric light, heat, power, water works, or other local public utility*," as to which the supervision, regulation and control of which was preserved to those cities exercising such powers on July 1st, 1921, the date on which the State Constitution of 1921 became effective. No mention is made of steam railroads, or railroads, other than "*street railway*," and under ordinary rule of construction of constitutional provisions, the maxim *expressio unius est exclusio alterius*, is applicable.

In the case of *Western Union Telegraph Co. vs. Railroad*

Commission, 120 La. 758, the Supreme Court of Louisiana was called upon to interpret the powers and duties of the Railroad Commission as set forth in the Constitution of 1898. The Commission had rendered an order imposing a penalty upon the Western Union Telegraph Company for failure to deliver a telegram sent from one point in the state to another, in accordance with certain of its rules and regulations. The telegraph company filed suit in the Twenty-Second Judicial District Court to set aside and annul the order on the ground that it was *ultra vires*, the power to regulate the service of telegraph companies not having been specifically mentioned in the expressed powers and duties vested in the Commission by Article 284 of the Constitution of 1898.

The Supreme Court held the Commission's order to be null and void, and through *Justice Monroe*, afterwards *Chief Justice*, said:

"The accepted rule with regard to the construction of laws establishing private corporations has been stated by the Supreme Court of the United States as follows: 'We take the general doctrine to be, in this country, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule, applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.' *Thomas vs. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950.

"As to the construction of the charters of municipal corporations, Judge Dillon says: 'It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or those

essential to the declared objects and purposes of the corporation.' Dillon's Municipal Corporations (4th Ed.), p. 145."

The Supreme Court of Louisiana then holds that

"The Constitution, therefore, in terms grants to the commission the power 'to make . . . regulations, to govern . . . the tariffs and service' of carriers of passengers, and in equally express terms grants it the power 'to make . . . regulations to govern' the charges of telephone and telegraph lines; and this court finds no warrant for holding the discrimination was not intended, for, as Judge Cooley observes:

"The remark of Lord Bacon, that, as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated, expresses a principle of common law applicable to the Constitution.' Cooley Const. Law, 18."

That the State may by its Constitution, or by legislative act, grant certain powers to a municipality and withhold others, is too well settled to require extensive argument.

In *City of Trenton vs. New Jersey*, decided May 7, 1923, 261 U. S. . . ., 67 L. ed. . . ., the Supreme Court, holding that municipal corporations have, in the absence of constitutional provisions, no inherent right of self-government which is beyond the legislative control of the state, quoted the following from *Hunter vs. Pittsburg*, 207 U. S. 161, 178, 52 L. ed. 151, 159, 160:

"The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without

compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme; and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

The Constitutions of Louisiana of 1898 and 1921 withheld from the City of New Orleans the power to supervise, govern, regulate and control the steam railroads operating in that city, by placing such power in the Railroad Commission of Louisiana, prior to the adoption of the Constitution of 1921, and in the Louisiana Public Service Commission, after that Constitution was adopted. No mere act of the legislature could take such power from either of these commissions and place it in the municipal authorities. To do so would be in plain violation of the State Constitution.

Our construction of the law is further borne out by the provision of Section 22, Article XIV, of the Constitution of the State of Louisiana of 1921, a portion of which is quoted in the district judge's opinion in this case.

The said Section 22 in full is as follows:

"Section 22. The electors of the City of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose their public officers. This section shall not prohibit the election of any officer by

the Council or appointment by the Mayor, nor the filling of vacancies for the unexpired term as now or hereafter provided by law; nor shall it apply to the Board of Liquidation, City Debt, or to any Board of Civil Service Commissioners or Examiners; nor shall it be construed as restricting the police power of the State, or as prohibiting the Legislature from appointing, or authorizing the appointment of, any board or commission with full authority in the City of New Orleans other than that of controlling the ordinary governmental functions or municipal government."

From the above it will be observed that the police powers of the state were specially protected against any abridgement by contract, or otherwise, by the City of New Orleans, and the police powers vested in the Louisiana Public Service Commission were further preserved and accentuated.

In the case of *Portland Light & Power Company v. Portland*, 210 Fed. 667, the court says:

"The right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power without the consent of the state where there is a general law on the subject emanating from the entire state."

In *Illinois Central R. Co. vs. St. Louis & N. E. R. Co.*, 125 Ill. App. 446, it was held that a statute giving the Board of Railroad and Warehouse Commissioners the power to pass upon the sufficiency of a proposed crossing by a street railway over the tracks of another road was not invalid as invading the powers conferred upon municipalities as to their streets. In that case it was said:

"True it is that the Commission may, in their discretion, prevent any crossing whatever to be made within the limits of a municipality, and if such interdictive authority can be said to abridge the exclusive jurisdiction of a city over its streets, conferred by the Cities, Villages and Towns Act, paragraph 209, must be held impliedly to repeal or modify such part of such former act as is inconsistent therewith or repugnant thereto. Furthermore, we think that such section may be upheld as an exercise of the inherent power of the state to enact all police laws necessary and proper to secure and protect the life and property of the general public, including not only those who may be residents of a particular municipality, but all who travel upon or intrust their property to the custody of railroads. To this extent the local police power of municipalities is clearly subordinate to that of the state."

CONCLUSION.

It appears to us that every argument advanced on behalf of the appellee in this case has been fully and completely answered by the decisions of this Honorable Court, as well as decisions of the Supreme Court of Louisiana. The appellee has failed to show in the record that the order complained of is protected by the impairment of contracts clause of the Constitution. It has failed to show that compliance with the order of the Louisiana Public Service Commission *to repair and put in a safe and suitable condition for vehicular and other traffic the existing viaduct over, above and across the properties of the Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans within the limits of said property*, being an exercise of the police power, deprives it of its property without due process of law. It has failed to show that the public service commission is without authority to

issue and enforce such an order. It has failed to show that its alleged contract with the City of New Orleans is an inviolable contract which places its property beyond the supervision, regulation and control of the public service commission. It has failed to show that power to make such an order as is here contested is lawfully vested in the City of New Orleans.

On the other hand, the bill of complaint and the affidavits show that the existing viaduct is in a dangerous condition; that it has been condemned by the City of New Orleans; that the City of New Orleans has repudiated its alleged contract to keep the said viaduct in repair and has taken no steps to do so for a number of years; that the City of New Orleans is not itself making any effort to exercise the power now claimed for it by the appellee to require a railroad company to repair and put in a safe condition the viaduct.

The laws of Louisiana show that the charter of the Morgan's Louisiana & Texas Railroad & Steamship Company granted by the Legislature of Louisiana compels that company to preserve any water course, street, highway, turnpike, or canal within the State of Louisiana, which course of said railways may pass upon, along or *intersect, touch or cross*, so as not to impair its usefulness to the public unnecessarily, etc., and that the police power cannot be bargained away.

The appellee has already received valuable considerations for its granting to the public of a right to cross its property within the Fifth District of the City of New Orleans, and the order of the Commission only requires the performance of a duty owed

the public to maintain in a safe and suitable condition the existing structure.

It is, therefore, clear that the lower court has erred in granting the preliminary injunction and thus perpetuating a danger to life and property.

Firmly believing that the authority and power to make the order in controversy rested exclusively in the Louisiana Public Service Commission, and that the exercise of that power by the public service commission in this case was lawful, reasonable, just and necessary in the interest of the public welfare, and not violative of any of the vested rights of the appellee, we confidently commit the case into the hands of the court, and ask that the decree of the lower court granting a temporary injunction be set aside and that the bill of complaint be ordered dismissed.

Respectfully submitted,

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Attorney General of the State
of Louisiana.

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Office Supreme Court, U. S.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

No. 421

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

versus

MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY,
Appellee.

Appeal from the District Court of the United States for
the Eastern District of Louisiana.

ORIGINAL BRIEF ON BEHALF OF MORGAN'S
LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY, APPELLEE.

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**ORIGINAL BRIEF ON BEHALF OF MORGAN'S
LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY, APPELLEE.**

STATEMENT OF THE CASE.

This is a suit in which the Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation

(hereinafter referred to as Morgan Company), seeks to have set aside an order of the Louisiana Public Service Commission (hereinafter referred to as Commission), and in which it prayed for an interlocutory, and after final hearing, a permanent injunction restraining the Commission, its members and attorneys (all also citizens and residents of the State of Louisiana) from enforcing or attempting to enforce the order complained of.

From a decree rendered by their Honors, Bryan and King, Circuit Judges, and Foster, District Judge, on May 23, 1923 (Tr., 178), ordering that an interlocutory injunction issue, as prayed for, the Commission, its members and attorneys have taken this appeal.

The first twelve pages of the brief filed herein on behalf of the Commission contain a correct summary of the pleadings filed and proceedings had in the District Court, so we will not burden the Court with a detailed repetition thereof here, but from which it appears, as alleged, that this is a controversy between citizens of the same State, arising under the Constitution and laws of the United States and that the amount in controversy is in excess of five thousand dollars.

The admissions in defendant's answers, coupled with the uncontradicted affidavits, ordinances and exhibits, prove the following facts:

On April 11, 1878, the Morgan Company acquired by fee simple title a strip of land in the City of New Orleans

(Fifth District, known as Algiers), measuring 375 feet front on the Mississippi River by 24 arpents (about 4600 feet) in depth between parallel lines. (Tr., 11.)

For more than forty years this strip of land has been under fence, in the sole and exclusive possession and control of the Morgan Company, and the public has been excluded therefrom, except for a traffic viaduct at Patterson Street (which is immediately behind the levee forming the bank of the Mississippi River), a foot viaduct at Eliza Street, neither of which are involved in this controversy, and except for the viaduct at Newton Street, which is the viaduct involved in this controversy.

No street, roadway or crossing has ever been expropriated or otherwise acquired across this property, and no right to cross the property has ever been granted or permitted except at Patterson Street and Eliza Street (which are not involved in this case), and except at Newton Street. (Tr., 49, 54, 55, 57, 58, 59.) The statement of the Commission in its opinion, found on pages 144 and 147 of the transcript, that the construction of the viaduct was made necessary by the closing of streets from upper to lower Algiers, is incorrect, and there is no proof in support thereof. The occasion for constructing the viaduct was the closing of Patterson Street by the United States when it built the navy yard in Algiers. (Tr., 90.)

In the year 1904 the City of New Orleans advertised for sale a franchise for the operation of a street railroad

in that portion of the city known as Algiers. Among other provisions this franchise contains the obligation on the part of the adjudicatee to operate its street railroad across the above-mentioned property on a viaduct (which the city guaranteed to provide) and to pay during the life of the franchise (50 years) the cost of maintaining all parts of the viaduct. (Tr., 17.)

This franchise was adjudicated to Messrs. Carroll and Dinkins and by them transferred to the Algiers Railway and Lighting Company. (Tr., 23.) In 1905 the City of New Orleans obtained from the plaintiff, by contract, the right to cross the above-mentioned strip of land at Newton Street with a viaduct, conditioned on the city paying the cost of erecting the viaduct and thereafter the cost of maintaining it (Tr., 14, 49), and in 1907 the viaduct was constructed.

The franchise held by the Algiers Railway and Lighting Company was sold under foreclosure proceedings and acquired by a man by the name of Ballard, who in 1917 transferred same to the South New Orleans Light & Traction Company, which company thereby assumed all of the obligations imposed by said franchise upon the holders thereof. (Tr., 182.)

The South New Orleans Light and Traction Company from 1917, up to the summer of 1922, operated its street railroad cars over and across the entire length of the viaduct (Tr., 96), and at various times made repairs thereto.

(Tr., 56.) The viaduct is some two thousand feet in length and extends for several hundred feet on each side of and beyond the two sides of the Morgan Company's property, hereinabove referred, over and along Newton Street on the upper side, and General Meyer Avenue on the lower side, completely blocking those two streets. (Tr., 49.) At the time of the hearing in the District Court the South New Orleans Light & Traction Company was operating its cars on and across all of the viaduct except about 435 feet thereof, over which its passengers were being transferred on foot on the viaduct from car to car.

The City of New Orleans is not seeking to set aside either the contract with the Morgan Company whereby it obtained the right to cross to Morgan Company's property, under the condition that it, the city, would maintain the viaduct or the contract with the South New Orleans Light and Traction Company as the transferee of the franchise granted to Messrs. Dinkins and Carroll, under which the South New Orleans Light and Traction Company is obligated to maintain the viaduct. In fact the city has, by ordinance, instructed the City Attorney to bring suit to recover from the South New Orleans Light & Traction Company some \$6,600.00 which the city had expended in repairs. (Tr., 27, 39.)

The present viaduct at Newton Street, if kept in repair, is now and will be for many years to come, amply sufficient to care for traffic of all kinds, characters and description, including street railroad traffic. This viaduct, as above

stated, extends beyond the plaintiff's property a distance of several hundred feet along and over Newton Street, a public street, completely blocking same for all practical use and preventing its use for any other purpose. Any other viaduct erected across the plaintiff's property to take care of the traffic would likewise block Newton Street for a similar distance and prevent its use for any other purpose. (Tr., 51.)

The cost to the Morgan Company to comply with the order complained of would exceed the sum of \$48,000.00 (Tr., 169).

The order complained of in the original bill reads as follows:

"Ordered that the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans (Algiers); the said viaduct herein ordered to commence at a point on Newton Street (Algiers) a sufficient distance from the properties of the M. L. & T. R. R. & S. S. Co. to provide suitable and proper grades for traffic thereover; all to be in accordance with plans and specifications which are hereby required to be filed with this Commission for its approval within 30 days from the date of this order; and it is further ordered, that within 90 days from the date of the approval of the plans herein required to be filed by this Commission that the

said M. L. & T. R. R. & S. S. Co. complete and open for traffic to the public the viaduct herein required."

After the decree of the three-judge Court ordering the issuance of a temporary injunction restraining the Commission, its members and attorneys from enforcing, or attempting to enforce, the foregoing order, the Commission reopened the proceedings before it and rendered the order now complained of, which order reads as follows:

"Ordered, that within fifteen days from the date of this order the Morgan's Louisiana & Texas Railroad & Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once.

"All orders in conflict herewith are canceled, rescinded and annulled." (Tr., 170.)

The Morgan Company, in its original and supplemental bills of complaint, contends that this order is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for the following reasons:

(a) Said order deprives petitioner of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and of Section Two of Article One of the Constitution of the State of Louisiana, adopted in the year 1921, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor.

(b) Said order denies to petitioner the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and if the said Constitution and laws, either or both, provide to the contrary, then same are unconstitutional, null and void, being in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as aforesaid.

(c) Said order impairs and renders null and void and of no effect the obligations of the City of New Orleans under the contract above mentioned existing between the City of New Orleans and petitioner, under which said city acquired the right to cross petitioner's said tract of land, in violation of Section Ten of Article One of the Constitution of the United States.

(d) Said Commission in rendering said order claims to be acting within the scope of authority and jurisdiction of Section Three of Article Six of the Constitution of the State of Louisiana, adopted in the year 1921, whereas neither the provisions thereof nor any other law of the State of Louisiana confers upon said Commission the power, authority or jurisdiction to render such an order as the one herein complained of, and said Commission was, and is, without power, authority or justification to render the order complained of.

(e) Said order requires that use be made of part of the public streets of the City of New Orleans, and attempts to regulate the same and control the use thereof, and **said order attempts to make part of the public streets of the City of New Orleans that portion of said viaduct referred to in said order** and to control the character, use and maintenance thereof and regulate the same, jurisdiction over which and jurisdiction to do which is vested exclusively in said City of New Orleans, and said Commission is without power, jurisdiction or authority so to do.

(f) Said order releases and extinguishes the obligations of the South New Orleans Light & Traction Company to the City of New Orleans to maintain in all its parts the viaduct constructed by said City of New Orleans as aforesaid, and places upon petitioner the burden of maintenance aforesaid in violation of the provisions of Section Thirteen of Article Four of the Constitution of the State of Louisiana,

adopted in the year 1921, and the aforesaid provisions of the amendments to the Constitution of the United States.

(g) Said order is unjust, arbitrary and unreasonable and there is no public necessity therefor, and constitutes an unreasonable interference with and burden upon interstate and foreign commerce, contrary to Section Eight of the Constitution of the United States giving to the Congress of the United States power to regulate commerce with various nations and among the several States, and the provisions of the Transportation Act of 1920, enacted under the authority thereof, as well as in violation of the Fourteenth Amendment to said Constitution, in that it deprives petitioner of its property without due process of law.

(h) Said order constitutes the taking of petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company without compensation to petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States and Section Two of Article One of the Constitution of the State of Louisiana, in that it deprives petitioner of its property without due process of law, and denies to petitioner the equal protection of the law in that under the laws of the State of Louisiana the South New Orleans Light & Traction Company before acquiring or obtaining any right to cross petitioner's property other than that acquired by the franchise under which it is operating as aforesaid has the right to and is obligated and required to expropriate the right so to do and to pay to petitioner in advance of the

taking or acquiring thereof a just and adequate compensation therefor.

The application for an interlocutory injunction was heard before a three-judge Court, consisting of their Honors, Bryan and King, Circuit Judges, and Foster, District Judge, who for written reasons, found in the transcript at pages 151 and 178, unanimously ordered that the writ issue as prayed for.

From this decree the Commission, its members and attorneys have taken this appeal.

ARGUMENT.

(A)

It is alleged in the bills filed herein that this is a controversy between citizens of the same State arising under the Constitution and laws of the United States and that the amount in controversy is in excess of five thousand dollars (Tr., 8, 162).

From the foregoing statement of the pleadings and facts we believe it is too clear to require argument that Federal jurisdiction exists. Their Honors, Judges Bryan, King and Foster, so considered it, and the Commission has not even questioned it.

Under the well-settled jurisprudence of this Court, as this Court has jurisdiction of the case, it has power to decide all questions involved. We will, therefore, discuss

the issues in what seemed to us, and to the trial Court, to be their logical order, namely:

First. Has the Louisiana Public Service Commission, under the laws of Louisiana, the power to render the order complained of, and

Second. If it be held to have that power, is the order complained of a valid exercise thereof?

(B)

HAS THE LOUISIANA PUBLIC SERVICE COMMISSION, UNDER THE LAWS OF LOUISIANA, THE POWER TO RENDER THE ORDER COMPLAINED OF?

In considering this question we ask the Court to bear in mind the following cardinal facts:

First. The viaduct in question is within the corporate limits of the City of New Orleans.

Second. The right to cross the Morgan Company's property with the viaduct was granted to the City of New Orleans under the condition that the city maintain it, which condition the Commission, by its order, has attempted to wipe out.

Third. The viaduct, subject to the condition that the city maintain it, now forms part of the public streets of the City of New Orleans.

As to these three premises there can be no reasonable dispute, the evidence in support thereof being uncontradicted.

We take it that it is well settled that it is only by the exercise of the police power and in order to promote the safety and convenience of the public, and then only in a proper case, that a railroad company can be required to build and thereafter maintain a viaduct across its tracks or to maintain an existing viaduct across its tracks.

We take it also as axiomatic that, while the right to exercise the police power of the State cannot be contracted away, it is within the power of the State to select which of its subordinate bodies or officials shall exercise its police power in any given situation or within any particular territorial limit of the State and to delegate to that subordinate body or official the sole and exclusive right and power to exercise the police power of the State, either to accomplish certain purposes or within certain territory for all or any particular purposes.

In other words, it cannot be that every board, commission or public official constituting part of a State's government is clothed with the right and power to exercise the police power of the State in all its various phases, because, if that were so, then what might seem to one board, commission or public official as necessary and proper for the public health, safety or convenience, might seem to another board, commission or public official either inadequate, un-

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necessary or inimical to the health, safety or convenience of the public, and such a situation would bring about the greatest confusion and conflict.

The Louisiana Public Service Commission contends that the right and duty to exercise the police power of the State of Louisiana, within the territorial limits of the City of New Orleans, for all purposes has been delegated to it, whereas we contend that the right and duty to exercise the police power of the State over steam railroads within the territorial limits of the City of New Orleans, in so far as the safety and convenience of the public, the use by steam railroads of the streets and the grade, of and opening and maintaining streets are concerned, has been delegated to the duly elected officials of the City of New Orleans, to-wit: the Mayor and Commission Council.

If the Louisiana Public Service Commission be correct in its contentions then it, and not the Commission Council, is clothed with the power and duty to regulate in the City of New Orleans the speed of trains, how long trains passing through the city streets shall be, for what duration streets may be blocked by trains, whether or not and where whistles may or shall be blown or bells rung, whether railroad crossings shall be protected by gates, flagmen or bells, what streets, if any, railroads shall be permitted to operate on or across, and finally what streets shall or shall not be kept in repair by steam railroads and what shall constitute proper repair.

By its own order the Commission recognizes that Newton Street does not cross the Morgan Company's property, as it describes the viaduct in question as the one "which connects the two ends of Newton Street," so that what it is also attempting to do is to incorporate, without condition, as part of the public streets of the City of New Orleans, that part of the viaduct which stands over defendants' property, which is the same thing as opening a street across defendants' property and regulating the repair thereof. If this is not true then the order is so manifestly absurd as to be indefensible on any ground because it would require the Morgan Company to repair and maintain a portion of a viaduct some twenty feet up in the air, which led nowhere and for which there would, and could be, no use, as there would be no approaches thereto.

In the trial Court, in argument, it was vehemently contended that the only purpose of the Commission in entertaining jurisdiction in this cause was to furnish to the public as speedily as possible a means of crossing the Morgan Company's property. An examination of the record will show that this contention is not well founded, because on November 3, 1922, the attention of the Commission was called to the fact that the officials of the City of New Orleans had the matter in hand, and a continuance was asked in order that the City of New Orleans could bring about a solution, whereupon Commissioner Williams of the Louisiana Public Service Commission declined to grant the continuance, saying in part (Tr., 103):

"We believe it is essential that the matter of jurisdiction be settled once and for all in order

that there may continue to be a proper functioning of the Public Service Commission."

* * * * *

"It is possible that questions have arisen here which are more fundamental and important to the people of the City of New Orleans and Algiers, and the State as a whole, for that matter, than even a continuance, for the time being, of this inconvenience to the people of Algiers, etc."

In the case at bar it is not necessary to determine what are, in general, the power and duties of the Commission and to fix their limits. It is merely necessary to determine whether to the Louisiana Public Service Commission or to the duly elected officials of the City of New Orleans has been delegated the authority and duty to exercise, within the territorial limits of the City of New Orleans, the police power of the State over steam railroads in so far as their operation affect the safety of the public and whether to the Louisiana Public Service Commission or to the officials of the City of New Orleans has been delegated the authority and duty to open or repair streets across property owned by a steam railroad company.

The power and authority of the Louisiana Public Service Commission pertinent to this case are conferred by Sections 4 and 9 of Article VI of the Constitution of Louisiana adopted in 1921, which sections read as follows:

Section 4. "The Commission shall have and exercise all necessary power and authority to **super-vise, govern, regulate and control all common carrier railroads**, street railroads, interurban rail-

roads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and mode of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the District Courts." (Black letters ours.)

Section 9. "Until otherwise provided by the Legislature all laws enacted by the General Assembly of the State of Louisiana since the adoption

of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, concerning or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

These powers are substantially the same, in so far as this case is concerned, as the powers conferred on the Louisiana Railroad Commission by Article 284 of the Constitution of 1913, the pertinent part of which reads as follows:

"Art. 284. The power and authority is hereby vested in the Commission, and it is hereby made its duty * * * to govern and regulate railroads, etc."

The pertinent provisions of Article 284 of the Constitution of 1898, by which the Railroad Commission of Louisiana was created, are identical with those of the Constitution of 1913, and read as follows:

"Art. 284. The power and authority is hereby vested in the Commission, and it is hereby made its duty * * * to govern and regulate railroads, etc."

The only difference between the Constitutions of 1898 and 1913 on the one hand and the Constitution of 1921 on the other, is in language and not in power, because the grant of the power to "govern and regulate" includes the right to "supervise and control." So, we submit, that the

three-judge court was correct in stating that "there is no appreciable difference in the authority of the two commissions."

And yet neither the law-making power nor the Railroad Commission itself considered that by the Constitution the power was conferred on the Commission to require railroads to provide overhead or underground crossings at even existing public crossings. This is evidenced by the fact that the Legislature felt it necessary to confer such power, and felt authorized to place such restrictions thereon as it saw fit, by Act 132 of 1918, the pertinent parts of which act read as follows:

Section 1. "Be it enacted by the General Assembly of the State of Louisiana, **that the powers and duties of the Railroad Commission of Louisiana are hereby added to and enlarged;** and the power and authority is hereby vested in the said Commission, and it is hereby made its duty to require the owner, possessor or operator of any railway, railroad, tram road, log road, transportation, irrigation or drainage canal, or syphon, crossing any public road already constructed or which may hereafter be constructed, to construct and maintain a suitable and convenient crossing over such public road, the said crossing to extend to the limits of the right of way, or fifty feet from the center of such railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers in respect to such crossings."

Section 2. "Be it further enacted, etc., That the Police Juries of the respective parishes of this State shall certify to the Railroad Commission of Louisiana any case where any railway, railroad, tram road, log road, transportation, irrigation or drainage canal, or syphon, has not constructed or maintained or refuses to construct and maintain, a crossing over a public road in accordance with the standard specifications of the State Highway Department of the Board of State Engineers, in respect to such crossings; whereupon, the Railroad Commission of Louisiana shall enter an appropriate order requiring such crossing to be constructed in accordance with the standard specifications of the State Highway Department of the Board of State Engineers in respect thereto."

Section 3. "Be it further enacted, etc., That the orders of the Railroad Commission shall be enforced in the manner provided by Articles 284 to 289 of the Constitution of the State of Louisiana as amended, by the imposition of the penalties provided therein for violations of the orders of the Railroad Commission of Louisiana." (Black letters ours.)

The Railroad Commission itself recognized that, previous to the passage of this act, it had no such jurisdiction, by stating in its order, quoted at length in *Gulf C. & S. F. Ry. Co. v. Louisiana Public Service Commission*, 151 La., 635 (92 Southern, 143):

"This is a proceeding which was filed with the Commission on January 21, 1921, under the provisions of Act 132 of 1918, etc."

Had it been considered that jurisdiction and power to order the doing of the things there ordered had been conferred by the Constitution the Commission would not have stated, as a preamble to its order, that the proceedings were brought "under the provisions of Act 132 of 1918."

In the just-above-mentioned case (*Gulf C. & S. F. Ry. Co. v. Louisiana Public Service Commission*, 151 La., 635), the Supreme Court of the State of Louisiana was called on to decide whether or not, under the Constitution and laws of the State of Louisiana, the Louisiana Public Service Commission has the power to require a railroad company to build an overhead crossing in the country and thus eliminate a grade crossing.

The Court did not hold, as is contended for on page 22 of appellant's brief, that the Commission was granted such power by the Constitution of the State, but it did hold that under the provisions of Section 4, coupled with the special authority conveyed by Act 132 of 1918, the Commission had such power.

Had the Court been of the opinion that the Constitution itself conveyed such authority it would have so held and no mention would have been made of Act 132 of 1918, whereas its whole decision is based on the fact that the authority there exercised was derived from Act 132 of 1918, thereby in effect holding that in the absence of the Act of 1918 the Commission would not have been held to have the authority there sought to be exercised.

Act 132 of 1918 is, by its very terms, restricted to crossings of public roads, and it is only applicable and the authority thereby conveyed on the Commission can only be exercised when the Police Jury (the governing body of the respective parishes in the State of Louisiana) has certified to the Commission that a crossing over a public road in accordance with the standard specifications of the State Highway Department of the Board of State Engineers is needed. By specifying the particular conditions under which the power granted by the act shall be exercised by the Commission, the Legislature clearly indicated that under no other conditions should the power be exercised. *Expressio Unius est Exclusio Alterius*, and by providing that such power should be exercised only on the certificate of the Police Juries of the respective parishes of the State of Louisiana the Legislature clearly indicated that the terms of the act should not apply to the Parish of Orleans, in which the City of New Orleans is located, for the reason that no Police Jury exists in the City of New Orleans, the governing body of the parish being the Commission Council of the City of New Orleans.

The grant of power contained in Act 132 of 1918 therefore cannot avail the Railroad Commission in the case at bar for the following reasons:

(1) The act clearly refers to existing public crossings to which the public has the unconditional right, whereas the right of the public to cross on the viaduct in question is conditioned upon the city maintaining it;

(2) The act refers to public crossings in the country and not in the City of New Orleans;

(3) The act refers to crossings to be constructed in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers, whereas the viaduct in question was constructed in accordance with plans prepared by the City of New Orleans;

(4) The act authorizes the Public Service Commission to exercise the authority therein conveyed only when petitioned so to do by the Police Jury of the respective parishes, whereas in the case at bar, not only did the city not petition the Commission to render the order complained of, but it contends that it has the sole and exclusive jurisdiction over the viaduct in question;

(5) The act refers to crossings of public roads, whereas subject to the condition that the city maintain the viaduct, the viaduct forms part of the public streets of the City of New Orleans.

The Commission itself and the Supreme Court of the State of Louisiana having recognized that, independent of Act 132 of 1918, the Louisiana Public Service Commission has no power to render an order requiring the construction of an overhead crossing on a public road, it necessarily follows, as the act does not apply to the viaduct in question, that, unless some other statute or constitutional provision is pointed out, that the Commission has not the authority to render the order complained of, none are pointed out

because none exist. The conclusion of the three-judge Court in this regard was correct.

In addition to the reasons set forth above the above-quoted provisions of the Constitution of 1921, and the Act of 1918 must be construed in conjunction with the provisions of Section 22 of Article 14 of the Constitution of the State of Louisiana for the year 1921, the pertinent parts of which read as follows:

"The electors of the City of New Orleans and of any political corporation which may be established within the territory now or which may hereafter be embraced within the corporate limits of said city shall have the right to choose their public officers. * * * This section * * * shall not prohibit * * * the Legislature from appointing or authorizing the appointment of any Board or Commission with full authority in the City of New Orleans other than that of controlling the ordinary governmental functions of municipal government."

Now, not only are the safety and convenience of the public and the control of the streets and their use and repair ordinary governmental functions of municipal government, but they are among the prime motives for the creation of municipalities.

Construing these sections of the Constitution together and in relation to each other it seems to us clear that it was the intention of the framers of the Constitution that the authority to exercise the police power, as it is here sought

to be exercised, was delegated to the Commission Council of the City of New Orleans and not to the Louisiana Public Service Commission.

It is to be noted that Section 22 of Article XIV of the Constitution of 1921 refers specifically to the City of New Orleans, thus setting it apart from the other portions of the State. The reason for thus providing is clear. The City of New Orleans is the only large city in the State of Louisiana. It, of necessity, is confronted with many problems peculiar to a large city, and in no way affecting the balance of the State. The framers of the Constitution, therefore, acted wisely in leaving it to the City of New Orleans to solve its own problems, and relieving it of the domination and control of outside bodies and officials, probably not conversant or alive to its real needs.

In construing articles in the Constitutions of 1898 and 1913, similar to Section 22 of Article XIV of the Constitution of 1921, the Supreme Court of Louisiana said, in *Board of Public Utilities v. New Orleans Ry. & Lt. Co.*, 145 La., 308 (314):

"Articles 319 and 320 of the Constitution of 1898, incorporated as Article 319 of the Constitution of 1913, provide a rule of local self-government **peculiar to New Orleans** in that all officers exercising the police power or administering the affairs of said corporation in whole or in part shall be elected either by the people, the City Council, or be appointed by the Mayor with consent of the Council."

If it be contended that, due to the difference between the language used in the Constitution of 1898 and 1913 and that used in the Constitution of 1921, the police power has not been delegated to the Commission Council, then the most that can be claimed, in so far as our contentions are concerned, is that it is, by the terms of Section 22 of Article XIV, the Constitution of 1921 left it to the Legislature to delegate the authority to exercise the police power within the City of New Orleans. And the fact is that by Act 93 of 1921 the Legislature had delegated this authority to the Commission Council of the City of New Orleans.

The pertinent portions of this act read as follows:

Section 8. "The Commission Council shall also have power:

"1. To order the ditching, filling, opening, widening and paving of the public streets and to regulate the grade thereof, etc.

* * * * *

"12. To authorize the use of the streets for railroads operated by horse, electricity, steam or other motive power and to regulate the same, etc., and to compel all such companies to keep in repair the street bridges and crossings through or over which their cars run."

The right and power here sought to be exercised by the Commission is inconsistent with the terms of this Act of 1921, passed only a few months after the adoption of the Constitution of 1921, because the Commission is here attempting to constitute (unconditionally) as part of the

public streets a part of the viaduct in question; in other words, it is attempting to open a street in the City of New Orleans, and in addition, it is attempting to regulate the use of the streets by a steam railroad, the authority to do both of which is vested, by the act, exclusively in the Commission Council of the City of New Orleans. Unless this act is declared unconstitutional, and it is not even so contended, then the power to do the things here sought to be done by the Public Service Commission is vested in the Commission Council of the City of New Orleans.

There are other provisions of the city charter which show that it was and is the intention of the law-makers of the State of Louisiana that such power shall be vested solely in the Commission Council of the City of New Orleans.

Act 159 of 1912 (charter of the City of New Orleans):

Section 1. "(d) The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intention thereof, that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed.

"(e) The city shall also have all powers, privileges and functions which by or pursuant to the Constitution of this State have been, or could be granted to or exercised by any city.

"(f) All powers of the city shall, except as otherwise provided in this charter, be vested in its

elective officers, subject to distribution and delegation of such powers as provided in this charter or by ordinance."

Section 6. "The Commission Council shall have the power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper:

"1. To preserve the peace and good order of the city.

"2. To maintain its cleanliness and health and to this end * * *

"(c) * * * and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease and to maintain a good sanitary condition in the streets, public places and buildings and on all private premises.

* * * * *

"(d) To suppress all nuisances.

"3. **To open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks.**

"4. **To keep the streets and crossings and bridges and canals and ditches clean and in repair."**

Not only is the Commission here seeking to exercise powers conferred exclusively on the Commission Council of the City of New Orleans, but it is seeking to exercise a power which it has no right to exercise in any part of the State, namely, that of eminent domain.

The right to cross the Morgan Company's property was granted without any compensation being paid to the Mor-

gan Company, but under the condition that the city maintain it. The attempt of the Louisiana Public Service Commission to wipe out this condition, and to leave the viaduct as a public crossing constitutes an attempt to appropriate a crossing across the Morgan Company's property without compensation. No provision of the Constitution or laws of the State of Louisiana granting such power has been pointed out, because none exists. We will discuss this point more at length in the next section of this brief.

We submit it is clear from the foregoing, and for the reasons given by the trial Court, that the Commission is here seeking in effect to open and repair a public street in the City of New Orleans, to control and regulate the use by a steam railroad of the streets of New Orleans and to exercise the power of eminent domain, that it has no authority or power so to do and that the decree appealed from should be affirmed.

(C.)

**EVEN IF THE LOUISIANA PUBLIC SERVICE COM-
MISSION BE HELD TO HAVE THE POWER HERE
SOUGHT TO BE EXERCISED, IS THE ORDER
COMPLAINED OF A VALID EXER-
CISE OF THAT POWER?**

The determination of this question involves a consideration of our contentions that the order deprives the Morgan Company of its property without due process of law; that it violates Section 2 of Article One of the Constitution of the State of Louisiana; that it denies to the Morgan Com-

pany the equal protection of the laws; that it renders null and void and of no effect the obligation of the City of New Orleans under the contract by which the City of New Orleans obtained the right to cross the Morgan Company's property; that it releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans in violation of the provisions of Section 13 of Article 4 of the Constitution of the State of Louisiana; that the order is unjust, arbitrary and unreasonable, and there is no public necessity therefor, and that the order constitutes the taking of petitioner's property without compensation, for the benefit of the South New Orleans Light & Traction Company, in violation of the Fourteenth Amendment to the Constitution of the United States, and also of Section 2 of Article One of the Constitution of the State of Louisiana.

As the same set of facts form the basis for discussion of the various questions of law just above mentioned we will treat all of these questions of law in this one subdivision of this brief.

Section 2 of Article One of the Louisiana Constitution of 1921 reads as follows:

"No person shall be deprived of life, liberty or property except by due process of law, except as otherwise provided in this Constiution. Private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

The exceptions referred to in this Article are generally those which refer to certain property which on account of its location is burdened with a servitude in favor of the public, such as property fronting on the Mississippi River which owes a servitude to the public, outside of the City of New Orleans, along the river bank of space for a public road.

There is no provision in the Constitution or elsewhere in the laws of Louisiana authorizing the taking of property used for railroad purposes or owned by railroad corporations for a street or crossing without just and adequate compensation previously paid.

The rights of the public in this regard are, under the laws of Louisiana, subject to the same limitations as apply to the taking of property belonging to individuals and used for farm or other purposes, namely, that it cannot be taken for public purposes unless just and adequate compensation be previously paid.

Under the law of Louisiana private property cannot be taken for a public road without just and adequate compensation being previously paid to the owners.

Revised Statute Section 1479 as amended by Act 123 of 1910, page 194 reads as follows:

"Whenever the State or any political corporation of same created for the purpose of exercising any portion of the governmental powers in the

same, * * * cannot agree with the owner of land which may be wanted for its purchase, it shall be lawful for the State, corporation * * * to apply by petition to the District Court in which the same may be situated * * * describing the land necessary for the purposes with a plan of the same and a statement of the improvements thereon, if any, and the name of the owner thereof, if known, at present in the State with a prayer that the land be adjudged to such State, corporation * * * upon payment to the owner of all such damages as he may sustain in consequence of the expropriation of said land for public works.
* * * ."

Act 49 of 1910 which refers to laying out, opening, constructing and repairing public roads in the country parishes and cities in Louisiana other than New Orleans provides by Section 14:

"That in all cases where it is necessary to acquire a right of way in constructing a new highway or change the location of an old, the right of way thereof shall be acquired by the parish, city, town or village, either by purchase, donation or by expropriation under the general laws of the State relative to expropriation of private property for public purposes, in the event the owner of said property and the governing authorities of such cities, towns and villages or the State Highway Engineer should not agree upon the price thereof."

It will thus be seen that, under the general law of the State, the right to cross the Morgan Company's property

could not have been and cannot now be acquired, in the absence of agreements, except by expropriating such right and by making just and adequate compensation therefor, and this applies whether the taking be by the City of New Orleans or the Louisiana Public Service Commission or any other public body, as no exception is made either in the Constitution of the State or in the general law of the State in favor of either the City of New Orleans, the Louisiana Public Service Commission or any other public body.

In the case of *State Ex Rel. Cotting v. Summerville*, 104 La., 74 (88) (28 Southern 977), the Court held:

"If relator was entitled, under the Constitution, to retain possession of his property during expropriation proceedings instituted under the right of eminent domain, until just and adequate compensation should be first made to him, that right could not be defeated by mere consideration of public convenience. In *Bruning v. New Orleans Canal & Banking Co.*, 12 La., 541 (repeated in *Dudley v. Tilton*, 14 La., 286), and *Kirk v. Kansas City S. & G. Ry. Co.*, 51 An., 682, it was held that usurpations and wrongs to private right of property cannot be justified by any considerations of benefits to commerce, and the right of expropriation of private property can only be exercised according to the forms of law."

It is clear, from the evidence that the property of the Morgan Company which is crossed by this viaduct is owned by the Morgan Company by fee simple title; has been un-

der fence and in the sole and exclusive possession of the Morgan Company, and the public has been excluded therefrom for over forty years and that no street has ever been opened across it and no right to cross it has ever been granted except the right granted to the City of New Orleans to cross the property with a viaduct under the condition that the viaduct be maintained by the city. For this conditional right the city paid no compensation.

When in 1905, in the judgment of the Council of the City of New Orleans a crossing across petitioner's property was necessary for public convenience and a viaduct necessary for public safety, the city was free to acquire the right to cross either by contract or by expropriation, the latter course requiring that the city previously pay to plaintiff just and adequate compensation for property taken and the damage to plaintiff's adjacent property. The city found it to its interest to pursue the former course, and the plaintiff gave the crossing to the city under the condition that the city pay the cost of construction of, and maintenance of, the viaduct; the Morgan Company bearing the entire expense of rearranging its facilities and improvements in order to admit of the crossing and receiving nothing from the city for the crossing itself.

This agreement was to the advantage of the city because it had already by contract bound the Algiers Street Railway Company, predecessor of the South New Orleans Light & Traction, to pay part of the cost of construction and all of the cost of maintenance.

The effect of the order here complained of is to set aside and render null and of no effect the contract entered into between the City of New Orleans and the Morgan Company, under which the crossing was granted, and the viaduct constructed, and if the order complained of is upheld the Morgan Company will find itself with a crossing across its property without just and adequate compensation being made therefor. The public, whether represented by the Louisiana Public Service Commission or the Commission Council of the City of New Orleans has no greater right over, into or upon the Morgan Company's property than is contained in the donation of the right of way for the crossing. To hold otherwise would permit the public to acquire plaintiff's property by what would amount to legal fraud.

The Supreme Court of the State of Louisiana in two well considered cases has set its face against the public acquiring property in any such unconscionable manner.

The case of *Voinche v. Town of Marksville*, 124 La., 712 (50 So., 662), is a case in which the ancestors of plaintiffs had donated to the Town of Marksville a piece of property under the condition that it be used for the permanent establishment and maintenance thereon of a market house and for no other purpose. The Town took the property, built a market house on it, subsequently abandoned the market house and devoted the property to other use. The heirs of Voinche sued to revoke the donation and obtain

possession of the property and the Supreme Court upheld their contention, and said:

"No analogy between a sale and a donation of property exists as to charges and conditions that may be imposed by the grantor. The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals. Civ. Code, Art. 1527. Donations *inter vivos* are liable to be revoked or dissolved on account of the non-performance of the conditions imposed on the donee. Id. Art. 1559. The word 'conditions,' as used in this article, is synonymous with the word 'charges'; and when a donation contains charges it is considered as made under the condition that it may be dissolved or revoked if they are not executed. Mourlon, Examen Du Code Napoleon, Vol. 2, p. 366. 'Conditions' means charges or obligations of the donee. Dalloz, Repertoire de Legislation, Supplement 5, No. 404, p. 149. Hence, if the town of Marksville was charged or obliged by the act of donation with the duty of establishing and maintaining a public market on the lot donated a clear case of nonperformance is alleged in the petition."

This language is particularly apposite to the case at bar because the Town of Marksville had the right, if it so desired, to expropriate the property for the purpose of constructing thereon a public market, as did the City of New Orleans for a crossing.

In the case at bar one of the conditions of the donation to the City of the right of way for the viaduct was that the City should maintain the viaduct. That there is noth-

ing contrary to the law and good morals can be no better shown than by the fact that the Court held that a similar stipulation in the donation by Voinche to the town of Marksville, namely, that it should establish and thereafter maintain a public market on the donated property, was not contrary to law and good morals.

The same principle and the same law which the Court in the Marksville case concluded gave the right to the heirs of the donor to revoke the donation to the town of Marksville give the right to the Morgan Company in the case at bar to revoke the donation of the right of way to the City on the failure of the City to execute the "charges" set forth in the donation, namely, to maintain the viaduct, and this Court, therefore, cannot consider the right to cross as having been acquired by the public without limitation, and should conclude that the right to cross is subject to the condition that the viaduct be maintained without expense to plaintiff and is terminable on the failure of the City to live up to this obligation.

Another case in point is that of *In Re New Orleans Auxiliary Sanitary Association*, 105 La., 173.

In this case the Court also answered the contention made by the Commission in the case at bar that because the property of the Morgan Company is used for railroad pur-

poses it thereby became dedicated to public use and that the right to cross could be enforced without compensation therefor. Answering this proposition the Court said:

"The proposition stated ignores the fact that while the purposes for which the association was established was public, the association itself was a private corporation, capable, in law, of owning property and incurring debts in its corporate capacity."

The Supreme Court of the State of Louisiana also held in the case of *V. S. & P. R. R. Co. v. Monroe*, 48 La., 1102, that because property is devoted to railroad purposes a municipality in the State of Louisiana cannot, without expropriating the same and making compensation therefor, take any part thereof for public streets, and this even though the railroad company itself had expropriated the property in question.

In the case of *Northern Pacific Railway Company v. Minnesota*, 209 U. S. 583, this Court announced the doctrine for which we now contend:

Page 590. "It is no longer open to question that municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts."

The same principle applies to orders of the Louisiana Public Service.

Page 590. "In cases arising under this clause of the Constitution this Court determines for it-

self whether or not there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the State.

Page 591. "The legislation which deprives one of the benefits of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, etc."

In this case (*208 U. S. 583*) this Court found that the crossing over which the viaduct was constructed was an existing crossing at the time it was originally constructed and that the contract whereby the municipality agreed to maintain the viaduct was void because it amounted to an attempt to contract away the police power. The Court assumes, in all the discussion, that compensation had or must be made for the property taken for the crossing, as will appear from the language used on page 595.

In the case at bar no compensation has been paid for the property taken and the property damages by the crossing and under the principles upheld and announced in the *Sanitary Company* and the *Marksville* cases, *supra*, the contract between the City of New Orleans and the plaintiff is binding.

While this Court has not passed on a case in which a railroad company was sought to be required to give a new crossing without compensation the Circuit Court of Appeals for the Eighth Circuit has done so in the well-reasoned case of *Atchison, Topeka & Santa Fe v. City of*

Shawnee, 183 Fed., at page 85, and the principles there upheld are clearly applicable to the case at bar.

If it could be held that under any law of Louisiana the Morgan Company could be required, without compensation, to give to the public a crossing across its property, then such law would be void because all other property holders would be receiving such compensation and the Morgan Company would not.

The order complained of seeks to bring this situation about.

We submit that the order complained of is void because it violates the Fourteenth Amendment to the Constitution of the United States and also Section 2 of Article One of the Constitution of the State of Louisiana in that it deprives the Morgan Company of its property without due process of law, and it denies to the Morgan Company the equal protection of the laws and that it also violates Section 10 of Article One of the Constitution of the United States in that it impairs and renders null and void and of no effect the obligations of the contract between the City of New Orleans and the Morgan Company under which the right to cross was granted by the Morgan Company.

We also contend that the order is null because it impairs the obligation of the contract between the city and the South New Orleans Light & Traction Company according to the provisions of which the Traction Company is obligated to maintain the viaduct in all its parts.

That the City of New Orleans has and had at the time this franchise was granted the power and authority to grant it, is certainly too clear to require argument or authorities to support it. That the City had the right to impose such reasonable burdens upon the grantees and their successors as in the judgment of the City seemed best is also equally clear. That the city had the right and power to impose upon the grantees and their successors the entire burden of maintaining the viaduct is made clear by the decision of the Supreme Court of the United States in the case of *Missouri Pacific Railroad Company v. Omaha*, 235 U. S. 121, in which the court said, on page 129:

"Where a number of railroads have contributed to the condition which necessitates such improvements (a viaduct) in the interest of public safety it is not an unconstitutional exercise of authority, as this Court has held, to require one of the companies to perform such work at its own expense."

The city having, in the exercise of the discretion vested in it, seen fit to impose the burden of maintaining this viaduct upon the street railway, any order of the Commission the effect of which would be, as would the present order, to relieve the street railway of this obligation, would necessarily impair the obligation of the contract between the city and the street railway, and would therefore be null and void.

In addition to the foregoing, Section 13 of Art. IV of the Louisiana Constitution of 1921, provides:

"The Legislature shall have no power to release or extinguish or to authorize the releasing or

extinguishment, in whole or in part, of the indebtedness, liability or obligation of any corporation or individual to the State or to any parish or municipal corporation thereof, etc."

Now, if the Legislature is without power to relieve the South New Orleans Light & Traction Company of its obligation to maintain the present viaduct, the City of New Orleans, a creature of the Legislature (except as protected by Sec. 22 of Art. XIV of 1921 Constitution), has no such power. If neither the City of New Orleans nor the South New Orleans Light & Traction Company can amend the latter's franchise in this particular, then the Louisiana Public Service Commission should not be permitted to do indirectly what the parties themselves are prohibited from doing directly.

An examination of the record of the proceedings before the Louisiana Public Service Commission warrants the conclusion, we believe, that while they were instituted in the name of Citizens of Algiers, they were instigated by the South New Orleans Light & Traction Company in the hope of relieving itself of the obligation of maintaining the present viaduct and of the increased burden resulting from its having failed to live up to its obligation in the past.

If the present order is upheld it will be successful.

Its president and counsel were present throughout the proceedings, and from an examination of the testimony of

Mr. Burges, its president, it is clear that he worked up the case and prepared all the data.

In the case of *Lochner v. New York*, 198 U. S. 45, this Court said, on page 64:

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S., 313; *Brinner v. Rebman*, 133 U. S., 73. The Court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S., 356."

(D)

Even if we be incorrect in all of our other contentions made in this case we believe that but little argument is required to show that the order is so unjust, arbitrary and unreasonable and that there is no public necessity therefor as to render the order illegal.

The viaduct in question is some two thousand feet in length. The record shows that at the time of the trial in the lower Court it was in such a bad state of repair as to render it unsafe for vehicular traffic over portions of its length not located over defendant's property, so that the order required the Morgan Company to repair a portion of the viaduct, which said portion is more than twenty feet in the air without providing for the repair of the other portions of the viaduct, so that if the portion of the viaduct over the Morgan Company's property is repaired and thereafter maintained as ordered, it would constitute practically an elevated bridge without any approaches thereto and could, therefore, not be used by the public as a crossing; in other words, the doing of the things ordered to be done in the order complained of would advantage the public not at all and the cost thereof would be a vain and useless expenditure of money.

For the foregoing reasons we respectfully submit that the decree appealed from should be affirmed.

The cases of *Vandalia R. Co. v. State*, 166 Ind., 219; 76 N. E. 980, 117 A. S. R. 370; *State v. District Ct.*, 42 Minn. 247; 44 N. W., 7; *L. R. A.*, 121; *State v. St. Paul, etc., R. Co.*, 98 Minn., 380; 108 N. W., 261; 120 A. S. R., 581; 8 Ann. Cas., 1047; 28 L. R. A. (N. S.), 298, cited on page 23 of the brief of the Commission have no application to the case at bar because they were cases in which the crossings referred to were existing crossings to which the public had an unconditional right, whereas in the case at bar the right of the

public to cross is conditioned on the city's maintaining the viaduct.

The cases *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct., 581, 41 L. Ed., 979; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct., 341, 52 L. Ed., 630; *Cincinnati, etc., R. Co. v. Connersville*, 218, U. S., 336, 31 Sup. Ct., 93, 54 L. Ed., 1060; 20 Ann. Cas. 1206, and note; *Chicago, etc., R. Co. v. Minneapolis*, 232 U. S., 34 Sup. Ct., 400, 58 L. Ed., 671; *Missouri Pacific R. Co. v. Omaha*, 235 U. S. 121, 35 Sup. Ct., 82; 59 L. Ed. 157; *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E., 584; 43 L. R. A., 638; *Vandalia R. Co. v. State*, 166 Ind., 219; 76 N. E., 980; 117 A. S. R., 370; *Portland, etc., R. Co. v. Deering*, 78 Maine, 61; 2 Atl., 670, 57 Am. Rep., 748; *State v. St. Paul, etc., R. Co.*, 98 Minn., 380, 108 N. W., 261, 120 A. S. R., 581, and note; 8 Ann. Cas. 1047, and note; 28 L. R. A. (N. S.), and note; *Houston, etc., R. Co. v. Dallas*, 98 Tex. 396, 84 S. W., 648, 70 L. R. A., 850, cited on pages 23 and 24 of the brief of the Commission are not applicable because in each case either the Court was referring to an existing crossing to which the public had an unconditional right, or in the very proceeding itself the right to cross was being expropriated and compensation paid therefor, whereas in the case at bar the existing right to cross is conditional, no attempt is being made to expropriate the right to cross and no compensation is being paid for the right to cross.

While it is stated on page 36 of the Commission's brief the crossing involved in the case of *Gulf Colorado and Santa*

Fe R. Co. v. Louisiana Public Service Commission, 151 La., 635 (92 So., 123), was a new crossing, the opinion of the Court does not so show, and the Court did not treat it as a new crossing, but considered it as an existing crossing; but even if it be considered as a new crossing, that case would not militate against the principles for which we contend, for the reason that if the plaintiff in that case did not raise or the Court did not pass on the question of the right to require a railroad company to grant a new crossing, free of charge, that decision cannot be considered as authority for such a proposition. In any event, such action by the Court would then deprive the railroad company of its property without due process of law.

The authorities cited by the Commission in its brief that the police power of the State cannot be bartered or contracted away have no application to the case at bar because we are not contending that the unconditional right to cross cannot be acquired in proper proceedings, we are merely contending, first, that the proper state agency, to-wit, the City of New Orleans has not taken any steps to acquire the unconditional right to cross, and second, until it does acquire such unconditional right, the condition under which the right to cross was granted must be complied with.

The case of *Atlantic Coast Line v. City of Goldsboro*, 232 U. S. 548 has no application because in that case the railroad company had devoted a part of its right of way to public use inconsistent with (and without conditions) railroad purposes, whereas, in the case at bar, the public has ac-

quired only a conditional right to use the Morgan Company's property, and for the further reason that the Commission in this case is not seeking to require the Morgan Company so to use its other property as not to endanger the public, but it is seeking to wipe out the condition under which the right to cross was acquired and to exercise authority over the viaduct, the right to exercise which is delegated to the Commission Council of the City of New Orleans.

The contention of the Commission (pp. 51, *et seq.*, of its brief) that the Morgan Company is obligated, by Section 7 of its Charter, is answered by a reading of the section itself. It clearly and exclusively refers to streets, etc., existing at the time of construction of the railroad, and by requiring it to repair such streets, etc., as it may "pass upon, along or intersect, touch or cross," it cannot fairly be held to be required to extend, free of charge, and maintain, across its property a street that merely touches the edge of its property.

The argument found in the Commission's brief, pp. 28 to 37, is based on two erroneous assumptions: first, that the Commission is competent to render the order complained of, and, second, that the public has acquired the unconditional right to cross the Morgan Company's property. The authorities cited in this portion of the brief are not pertinent because in each case the Court was dealing with either an existing street or crossing, the unconditional right to use which was vested in the public, or in the very

proceeding under consideration the unconditional right to cross was being expropriated and paid for. The same is likewise true of the contentions made and decisions cited on pages 37 to 42 of the Commission's brief.

There is no force in the contention that the Louisiana Public Service Commission has the power to render the order here complained of, merely because it is the Public Service Commission, for the reason that it has only such powers as have been delegated to it by statutory or constitutional provision and because the Courts of other States, in construing their laws conferring power on a similar body, have held such body to have the power, is no reason or authority for giving the differently worded laws of the State of Louisiana the same construction.

From the foregoing we submit that it is clear that this is not a case in which a railroad company is seeking to have set aside an order rendered by competent authority to require it to maintain a viaduct across its tracks on a public street, but is a case in which the railroad company is seeking to have set aside an order rendered by a board without power so to do requiring it to repair a viaduct across its property, property which it owns in fee simple, property which it has had under fence for over forty years, property from which the public has been excluded and over which the public has never acquired any rights except under conditions which are violated and ignored by the order complained of.

We submit, further, that this is not a case involving the power of a municipality or other properly constituted authority to disregard a contract by the terms of which it obligated itself to pay the cost of and thereafter maintain a viaduct across a railroad company's tracks along a public street, but is a case in which a municipality, instead of expropriating a street across a railroad company's property and paying the value of the property so taken, together with the damages to the railroad company's remaining property resulting from the taking, entered into a contract with the railroad company, as it had a right to do, whereby the railroad company granted to the municipality the right to cross under the condition that the municipality would pay the cost of, and thereafter maintain, the viaduct to be constructed.

This is a case in which a municipality, as it had the right to do, required a street railroad company to pay the entire cost of the maintenance of the viaduct; a case in which a Commission, without authority so to do, seeks to require plaintiff unconditionally and without compensation, to give a crossing across its property and to repair a viaduct constructed thereon under the condition that it would be maintained by the city.

In other words, the Louisiana Public Service Commission in the case at bar is seeking to do indirectly what neither it nor the City of New Orleans has the right or power to do directly, namely, to set aside and ignore the contractual conditions under which the right to cross was granted,

and to shift from the shoulders of a street railroad company, where the city in the exercise of a proper power not only has decreed it should rest, but has so contracted with the street railroad company, to the shoulders of a steam railroad.

For the foregoing reason we respectfully submit that the decree appealed from herein should be affirmed.

GEORGE DENEGRE,
VICTOR LEOVY,
HENRY H. CHAFFE,
HARRY McCALL,
JAS. HY. BRUNS,

Attorneys.

DENEGRE, LEOVY & CHAFFE,
Of Counsel.

Office Supreme Court, U. S.

FILED

SEP 8 1923

WM. B. STANLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 421.

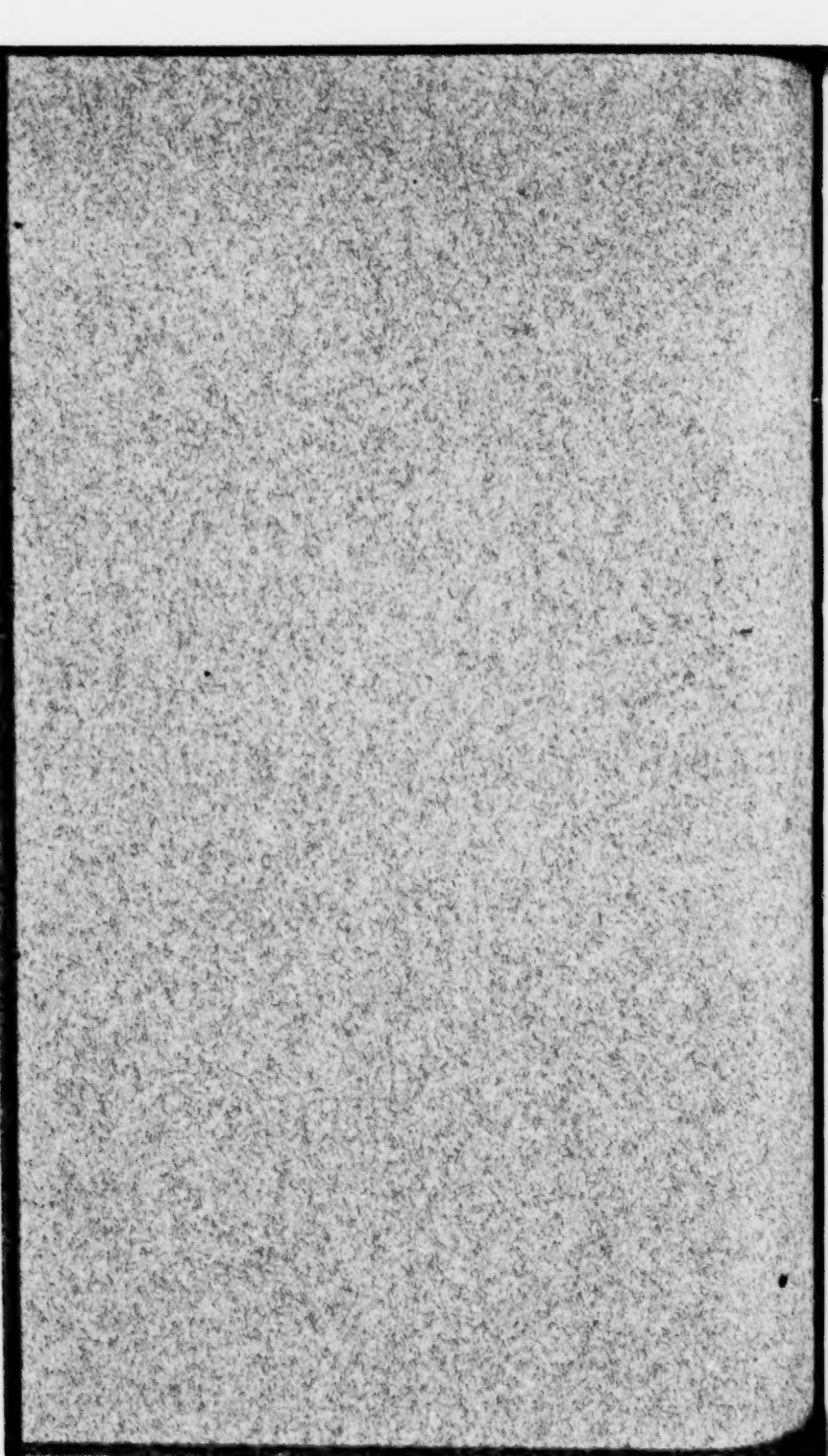
**LOUISIANA PUBLIC SERVICE COMMISSION ET AL.,
APPELLANTS,**

vs.

**MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY.**

**MOTION OF CITY OF NEW ORLEANS TO FILE
BRIEF AS AMICUS CURLE AND TO PARTICI-
PATE IN ORAL ARGUMENT, WITH CONSENT
THERE TO BY DEFENDANT IN ERROR.**

IVY G. KITTREDGE,
Counsel for City of New Orleans.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

ON WRIT OF ERROR FROM THE DECISION OF THE DISTRICT
COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISI-
ANA, BATON ROUGE DIVISION, IN THE CASE NO. 111 (IN
EQUITY) OF ITS DOCKET, ENTITLED

No. 421.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION AND
OTHERS.

**MOTION OF CITY OF NEW ORLEANS TO FILE
BRIEF AS AMICUS CURIAE AND TO PARTICI-
PATE IN ORAL ARGUMENT, WITH CONSENT
THERETO BY DEFENDANT IN ERROR.**

*To the Honorable the Chief Justice and Associate Justices of
the Supreme Court of the United States of America:*

Comes now into this honorable court the City of New
Orleans, through its undersigned counsel, Ivy G. Kittredge,

City Attorney of the City of New Orleans, and respectfully represents that one of the issues in this case is whether the power to compel railroads to establish, repair, and maintain viaducts over their tracks and along the lines of streets located entirely in the City of New Orleans vests in the Louisiana Public Service Commission, one of the plaintiffs in error herein, under its authority to regulate and govern all common-carrier railroads in the State of Louisiana, or whether said power vests in the Commission Council of the City of New Orleans under its authority to regulate and govern all streets located in said City of New Orleans; that the Government of the City of New Orleans has a great interest in this issue, and that therefore counsel for petitioner as *amicus curiæ* desires to obtain the permission of this honorable court to submit a brief herein on said issue, and also to participate in the oral argument on said issue on the side of the Morgan's Louisiana & Texas Railroad & Steamship Company, defendant in error, whose consent to such participation appears from the letter of its counsel hereunto annexed and made part hereof.

Wherefore your petitioner humbly so prays.

IVY G. KITTREDGE.

City Attorney for the City of New Orleans.

Order.

Counsel for the City of New Orleans is hereby permitted to submit herein a brief on the issue referred to in the foregoing petition and to participate in the oral argument on that issue as prayed for.

Morgan's Louisiana and Texas Railroad and Steamship Co.

Louisiana Western Railroad Company.

Legal Department.

Denegre, Leovy & Chaffe, General Attorneys.

In reply please refer to No. —.

NEW ORLEANS, LA., *August 31, 1923.*

IN THE DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA, BATON
ROUGE DIVISION.

No. 114. IN EQUITY.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP
COMPANY, *Plaintiff,*

vs.

LOUISIANA PUBLIC SERVICE COMMISSION AND OTHERS,
Defendants.

Hon. IVY G. KITTREDGE,

City Attorney,

City of New Orleans,

New Orleans, La.

SIR:

Referring to the above-entitled case, now on appeal to the Supreme Court of the United States, in view of the interest of the City of New Orleans in the principles involved, it would seem eminently proper that it should appear before the Supreme Court as *amicus curiae*, both by brief and argument, and we write to express this view on our part as counsel for

the Morgan's Louisiana and Texas Railroad and Steamship Company and to say that we will be pleased to yield to you a portion of the time allotted to us for argument before the Supreme Court.

Yours truly,

DENEGRE, LEOVY & CHAFFE.

VL:EC.

[Endorsed:] File No. 29,731. Supreme Court U. S., October Term, 1923. Term No. 421. Louisiana Public Service Commission *et al.*, appellants, *vs.* Morgan's Louisiana & Texas Railroad & Steamship Co. Motion of City of New Orleans to file brief as *amicus curie* and to participate in oral argument, with consent thereto by defendant in error. Filed September 8, 1923.

Office Supreme Court, U. S.

FILED

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WM. R. STANSBURY

CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1923.

NO. 421

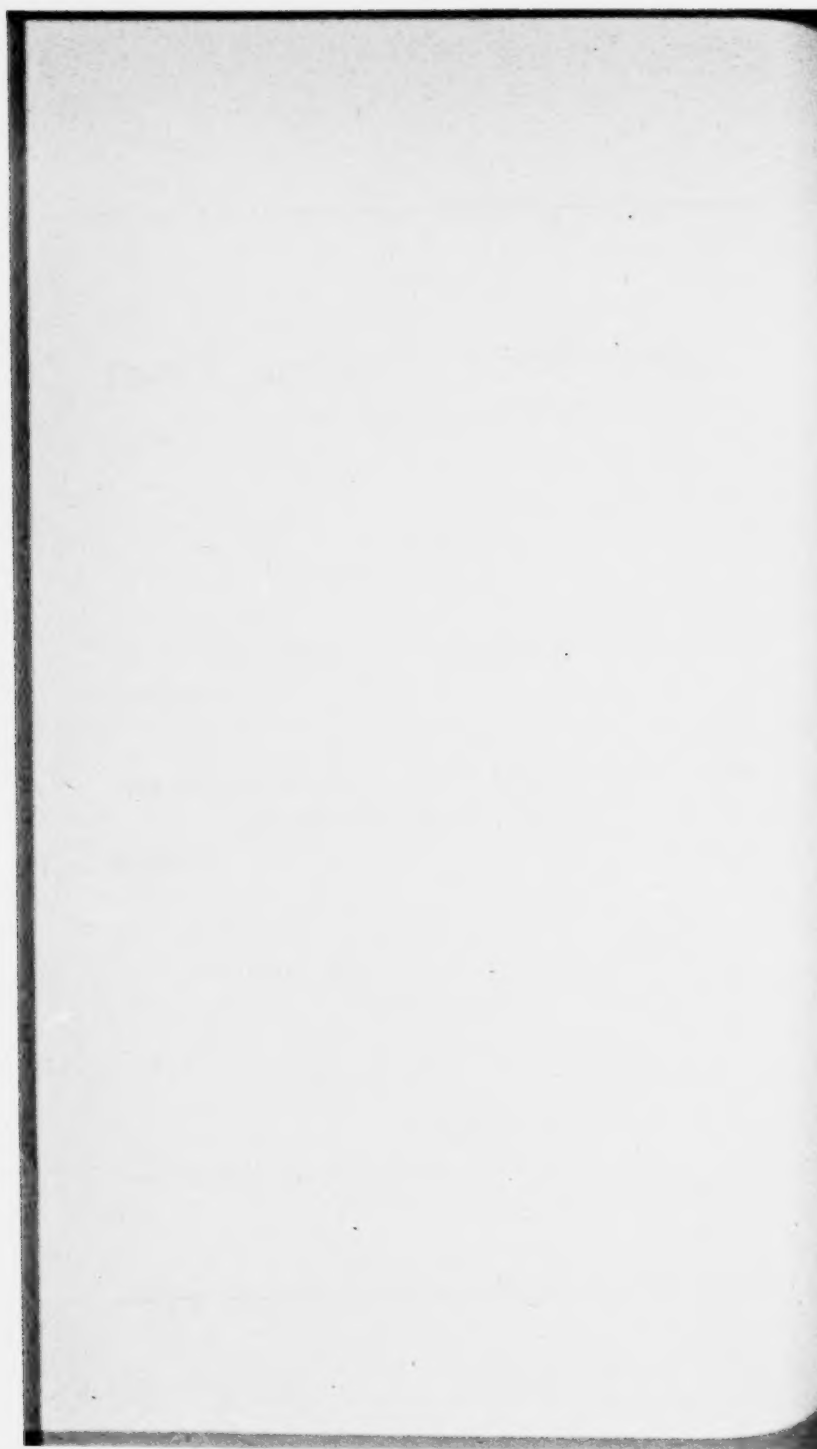
LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

versus

MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY,
Appellee.

BRIEF OF THE CITY OF NEW ORLEANS,
Amicus Curiae.

IVY G. KITTREDGE,
City Attorney for the City of New Orleans.
Feb. 14, 1924.



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IN THE
United States Supreme Court
OCTOBER TERM, 1923.

NO. 421

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

versus

MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY,
Appellee.

BRIEF OF THE CITY OF NEW ORLEANS,
Amicus Curiae.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

For the purpose of this brief, the following concise statement of the case will suffice:

In 1905 the Morgan's Louisiana and Texas Railroad and Steamship Company granted to the City of New Or-

leans, upon certain conditions, the right to construct and maintain permanently along the lines of the extension of Newton Street a viaduct across said company's property in the Fifth District of the City of New Orleans, popularly known as Algiers (Tr. 15). Thereafter the viaduct was constructed, being completed about the year 1907 and being used ever since as a way for pedestrian, vehicular and other traffic across said railroad company's land. Latterly, the viaduct needed repairs and steps were taken to cause the repairs to be made by said railroad company and by a street railroad company which had also been granted a right to use the viaduct for its tracks.

Pending these negotiations, the Louisiana Public Service Commission, upon a petition of citizens of Algiers, issued orders of date November 11th and December 1st, 1922, requiring the said Morgan's Railroad Company to provide a safe and suitable traffic viaduct over and across its tracks at Newton Street in the City of New Orleans, said viaduct to commence at a sufficient distance from the properties of said company to provide suitable and proper grades for traffic thereover (Tr. 149). Subsequently, the Public Service Commission modified these orders, and in lieu thereof required said railroad company to repair and put in safe and suitable condition for vehicular and other traffic the existing viaduct across this property, within the limits of said property, and connecting the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition (Tr. 171). This modification of the previous orders was intended to avoid a conflict of jurisdiction between the Public Service Commission and the City of New Orleans, but, as will be seen in the argument, it does not really have that effect.

The railroad company obtained an injunction against the enforcement of the orders of the Public Service Commission (Tr. 179), and the Public Service Commission took an appeal to this court (Tr. 180).

ARGUMENT.

The City of New Orleans, which is jealous of its governmental powers over the streets and highways within its limits, has but one point to make in this case, to-wit: that the jurisdiction of the Louisiana Public Service Commission does not include power to compel the Morgan's Railroad Company to maintain and repair said Newton Street viaduct, nor the power to compel any railroad company to construct, maintain or repair any viaduct for the purpose of carrying across its tracks or property any street in the City of New Orleans.

The City of New Orleans claims that jurisdiction in this regard is lodged in its Commission Council or governing body.

To this extent only does it join the defendant and oppose the plaintiff in this case. The City takes as its premises that, under the police power of the State of Louisiana, the railroad company may be compelled to construct, maintain or repair the viaduct here in question; and contends that inasmuch as said viaduct was constructed without any reference to its relation to the services to be rendered by the railroad company (and inasmuch it has no relation to such service), but was constructed for and relates solely to the convenience and safety of the people of New Orleans, or the public generally, jurisdiction with respect to said viaduct lodges not in the Public Service Commission, but

in the City of New Orleans under ample police powers granted to it by the Legislature.

The viaduct in question continues and carries Newton Street over the tracks of the railroad company. It was constructed for the purpose of furnishing an avenue for traffic across a long unbroken strip of ground used by the railroad company as a right of way and as a site for its shop yards, railroad yards and terminals. Before the viaduct was constructed there was no crossing at this place.

Newton Street ended on one side of the strip of ground and began again on the other side. In time, as the City grew, Newton Street built up beyond the railroad's property, and it became necessary to open said street through said railroad's property, or build over or under said property. The viaduct was constructed to answer this public need and was designed and intended solely for the comfort and convenience of the public desiring to travel from one side of the railroad company's land to the other. The viaduct was constructed under contract for the City of New Orleans, and had no relation to the transportation of persons or property by the railroad company, nor was it intended, nor does it, facilitate the public in transacting business with the railroad company. In short, it has no relation whatsoever, either by intent or by actual use, to the service and functions rendered and performed by the railroad company.

The city had under consideration the renewal or repair of the viaduct or the opening by grade crossing of Newton Street, when suddenly the Public Service Commission virtually tried to take the matter out of the City's hands and ordered the repair of the viaduct by appellee. Hence this case comes up on a question of jurisdiction as

between the Public Service Commission, and the City through its Commission Council. This City in all its charters, for many years past, i. e., that of 1870, that of 1882, that of 1896, and the present charter, Act 159 of 1912, has been given full police powers over its streets and the use thereof. The Council of the City is given power and it is made their duty (Section 6) to open and keep open and free from obstruction all streets, and to keep the streets and crossings and bridges in repair. By Section 8, the Council is empowered to order the opening, widening and paving of public streets, to regulate the grade thereof and to sell or change the destination thereof, and to authorize the use of streets by railroads. By Sections 28 and 29, the Council is authorized to grant privileges and franchises for the use of public streets in connection with private businesses. In a word, the Commission Council is expressly given very broad specific powers over its streets.

Such power is always essential to city government, and the Louisiana Supreme Court has at all times liberally construed such power in favor of this City. But the present charter has gone further and in emphatic terms guaranteed full and plenary police power to this City in the broad and comprehensive language used in Section 1, paragraph (e) of the charter, to-wit:

"The City shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city."

The sole and only question to be answered under Section 1 (e) is, "Could the Legislature in 1912 have granted to the City the power to control and say whether a viaduct

should be placed over a railroad crossing in this City, or whether a tunnel should be dug under the street, or whether a grade crossing should be made, or whether the public welfare demanded the sale or exchange and hence the closing of that street? Once the safest passage for the city public, not the railroad patrons, be decided upon, then the City alone is arbiter as to who should construct the crossing. In this case, this City decided some years ago, with the full acquiescence of this Public Service Commission (then under the name of Railroad Commission), that the expense of a viaduct be provided by this railroad, the street railway, and the City. Hence the appellant is now estopped from claiming jurisdiction to interfere with the control of city streets and the safety of the people using the same. *Non constat* that the city might decide to abandon and close, exchange, or sell either the portion of Newton Street below or above these railroad tracks. Could appellant in the face of such action still enforce its order and compel the repair of this viaduct by this railroad or any other? On the other hand, the City, who considered a grade crossing, might decide on such a crossing. In that event, must there be two crossings, one on the ground and one in the air? The same would apply if the City decided upon a tunnel. In 1912, the City had such control as here involved by special legislative delegation; but in the event only that this Honorable Court should reverse the lower Court, and decide that the City did not have this control by special statute, then we assert that nothing in the Constitution of 1898 forbade the legislature to delegate such power, and hence this Honorable Court will follow the decisions repeatedly rendered by the Louisiana Supreme Court, in construing Section 1 (e) of our charter, and hold that said section and paragraph

granted such power to the City as though specially delegated by the legislature.

The last and most important, and most far reaching interpretation of Section 1 (e) of our charter by our Supreme Court involved a question closely allied to the one at bar. That decision (*State vs. City*, 151 La. 23), should greatly assist, if not guide, this Honorable Court in determining the issue now before it. Our Constitution of 1921, somewhat enlarged the powers of appellant, in the following sections of Article VI:

"Section 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals, (except irrigation canals), and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.*****"

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission."

"Section 9. Until otherwise provided by the Legislature, all laws enacted by the General Assembly of the State of Louisiana since the adoption of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, con-

cerning, or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

Thus adding to the jurisdiction of the Public Service Commission, street railroads, electric light, heat and power plants, etc., etc. But the same constitution provides as follows, in Section 7 of the same Article VI:

Section 7 of said Article further provides:

"Nothing in this article shall affect the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, water works, or other local public utility, now vested in any town, city, or parish government unless and until at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors of such town, city or parish, voting thereon, shall vote to surrender such powers. In the event of such surrender such powers shall immediately vest in the Louisiana Public Service Commission, provided, that where any town, city, or parish shall have surrendered as above provided, any of its utilities, it may in the same manner, by a like vote, re-invest itself with such powers."

Under the above sections of Article VI, the Attorney General on behalf of appellant, filed suit against the City to have the Public Service Commission recognized as being the rate-making body with jurisdiction over the street railways, electric light and gas plants and all other local public utilities in New Orleans, contending with some force that the power of rate-making must be specially delegated and

that our charter did not delegate such power to the city; that said Section 7 of Article VI could not be invoked by this city because of the absence of any such specially conferred rate-making power prior to the adoption of the said constitution. Our full Court of nine Justices in an able decision (*State vs. City*, 151 La. 23), held that under Section 1 (e) of the charter, the City had the right to fix rates, and hence that the City, and not the Public Service Commission, is the rate-making body for all local public utilities.

Until this suit, the long and often settled jurisprudence that the City has absolute and exclusive control over its streets and the use thereof by local or any other utilities, has never been questioned.

In other words, the Attorney General admitted that under all charters of this City, prior to the present charter of 1912, the power had been clearly and specifically delegated to the city to supervise, regulate and control all public utilities, and that it also had full supervision and control over the streets and other public places of the city; his contention, however, was that the City had never had the rate-making power specifically delegated to it, and that therefore, Section 7 of Article VI of the Constitution, in stipulating that "the powers of supervision, regulation and control over any ***** local public utility, now vested in any city or town" shall remain therein unless the electors of such city vote to surrender such powers, not only did not reserve to any city in the state rate-making power (even if it had formerly possessed such power), but that this City had never at any time been given such power. We submit that the case has a direct bearing, because the whole subject was there threshed out and by holding that the city, under Section 1, Paragraph (e), of its charter already had rate-

making power over public utilities using its streets, etc., the court never contemplated the absurdity, while interpreting the extreme power of rate-making in favor of the City, of simultaneously denying it, and for the first time depriving it of the absolute and exclusive control over the streets and public places used by such utilities. In the light of appellants' contention before this court, the said Supreme Court's decision above referred to would have been "*brutum fulmen*".

This Honorable Court, we are fully satisfied, would not lend itself to a decision on a side issue such as the question now before it, of a viaduct, which would in reality strike with nullity the decision of our State Supreme Court in the above very important decision rendered in 1922, which is of such crucial importance to the present and future of the City of New Orleans. If the Public Service Commission has supervision and regulation and control of our streets to the extent of ordering when and where a viaduct or tunnel or other crossing may be placed on such street, then they would certainly have the right, if in their opinion the necessity of the public demanded it, to order the various trunk lines entering this city to change from one street to another.

And likewise, they could order them, without consulting the City authorities, where they might put their freight sheds, passenger depots and their yards and permanent buildings and then command the City to pave and develop or widen, etc., the streets necessary to make useful and available the decrees of said Public Service Commission. Chaos would follow. The City would order the street railway or other utility to abandon a certain street or perhaps, as was

done recently, order the removal of one of the steam railroad trunk lines from one street, where the traffic congestion made its use by freight trains a menace to public life and property to another street less congested and where the business of the railroad could be as successfully handled, and then the Public Service Commission could countermand the order, ignore the City Council, and order the trunk line either to remain in that street or, in the face of the city ordinance, to either elevate its road or make grade crossings. Such elevation in a residential street, if possible of accomplishment, would mean absolute torture and ruin to the residents of that street.

It will doubtless be argued before this Honorable Court that in 1918, the State Legislature gave the Railroad Commission (the predecessors of the Louisiana Public Service Commission) the power and authority, upon request of any police jury, to order any railroad, tramroad, logroad, irrigation or drainage canal crossing any public road, to construct and maintain a suitable and convenient crossing for such public road, and that our Supreme Court upheld that right in the Railroad Commission in the case of *Gulf C. & S. F. Ry. Co. vs. Louisiana Public Service Commission*, 151 La. 635. Of course, we admit that. But for the very reason that it took an act of the legislature to confer this power on appellants, it is conclusive that appellants not only did not have the power before, but that that power was strictly confined to public roads in the country only; which is further shown by the utilities mentioned in addition to railroads, such as logroads, or drainage canals, etc., and had no bearing or relation to a large city like New Orleans, where the control and supervision of the streets have not only been from time immemorial lodged

in this City, but their exclusive rights have been so often upheld by the Supreme Court of this state and by this Honorable Court, that it were a waste of time to cite such decisions now.

It is manifest that in a sparsely settled agricultural state, such as ours, with sixty-three parishes, including the City of New Orleans, each parish having several public roads probably crossing railroads, canals, etc., the power to control the crossings and bridges should be placed in the central power, the Railroad Commission, and not left to the whim of each small county or parish police jury, who through ignorance or prejudice might harass these public utilities beyond endurance, or on the other hand, might so favor some or all of these utilities as to jeopardize the convenience and safety of travellers on the public roads. Had the legislature contemplated taking such rights away from New Orleans and other cities, relative to the supervision and control of their streets, the language must of necessity have indicated that intention. And yet, there is not one word in the act that contemplates lodging the power in the Railroad Commission to order the crossings of a village street, much less the streets or public places of any city. Nor does the language provide that any village, town or city whose government is divorced from that of the parish or county, shall have the right to appeal to the Railroad Commission for such a crossing. Another feature to be considered which has some bearing, is that under our law, particularly our civil code (articles 453, 454 and 458 and other laws, and the jurisprudence thereon), the streets of this city are owned in fee simple and belong to the public and are denominated "common property," which idea of ownership is further demonstrated by

the fact that Act 93 of 1904 authorizes the council of this city to sell a street not over 200 feet long, and Act 83 of 1916 authorizes all municipal councils of cities, towns and villages, to exchange streets for other property for the purpose of laying out new streets, while Act 93 of 1921, amending the city charter, authorizes this City outright to sell streets which are no longer necessary for the public use, etc., etc. While under the same civil code, and the jurisprudence of this state, the title or fee simple to the property used as public roads, is never vested in the public, who only have a right of servitude or the right to use a road as long as it be necessary, free from any obligation to compensate the owner therefor. But whenever the road, for any reason, be abandoned, the use and control of such road at once reverts to the owner who has been compelled to yield it for public use as a highway. Therefore, it should be strange indeed if the control and the use of crossings of streets should be delegated to a public utility board while the legislative body, representing the city that owns that street were ignored and deprived of the control of their own property for their own public, who elected them, among other reasons, for the specific purpose of supervising, paving, draining and controlling the public streets. We submit that this case (151 La. 635), has absolutely no bearing at all in favor of appellant but it must be construed in favor of this city, because it proves that legislative enactment was necessary to place these crossings under the power of appellants, and there has never been any such legislative enactment giving to appellants power and control over either the crossings, streets, or any other public property in the City of New Orleans; but, on the other hand, the specific and exclusive power to con-

trol such streets and public places has for generations been lodged in the City Council of this City. As a matter of fact, in the issue at bar, this City, exercising its delegated control and discretion, had stipulated when the viaduct was built, that it should be strong enough and large enough to permit the street railway to cross it and, of course, even the appellants will not contend that either they themselves or the railroad in this case has any say or control over the street railways of this City. In order to do equity, the City had ordered and compelled the street railway to pay the larger part of the cost of maintaining this viaduct, and it itself defrayed part of the cost and placed the balance on the M. L. & T. Railroad Company. Recently, when the viaduct needed repairs, this city had before it the question of compelling the street railway company to defray the whole expense of repairing, according to their contract with the City.

This again illustrates the incongruity and chaos that would result did this Honorable Court render the judgment requested of it and denominate two bodies, the Public Service Commission and the City of New Orleans with conflicting powers over the city streets. The Public Service Commission, having no control over the City or the street railroad, undertook to order appellees to defray the whole cost. This was the most they could do, and they did it, and yet the street railroad frankly admitted their legal liability to defray at least a great portion of this cost of repair. Hence, the result of such dual control is that the Public Service Commission might order the railroad to defray all the expense while the City might order the street railroad to pay it all. This is another illustration of the impossibility of having two bosses or of serving two masters.

Suppose the City, which was considering the question of expropriating a sufficient width across the railroad property to continue Newton Street, had decided to continue Newton Street and establish a grade crossing, then if appellant had the right to order the viaduct built over that street no power could have compelled the railroad to remove that viaduct, and the result would be that, a viaduct would be erected across two or three blocks of that street against the wishes and ordinances of the City Council, which would have no right or power to order its removal. If that be true, then appellants herein, in their supervision of railroads, telegraph lines and other utilities coming into this City, have the absolute power to order anything put on the streets that they consider necessary, whether it inconvenience the public or whether the city council wishes it there or not; and if this viaduct or obstruction or special use of the streets and public places should interfere with the franchise and rights that the City has granted to the street railroads and other public utilities, then the City would be in the helpless and ridiculous position of having granted franchises and rights which they would be responsible for in damages, while at the same time having been stripped of the power and jurisdiction to control its own streets and to carry out the contracts that it considered to be for the best interest of the public. We repeat that from any angle that this controversy be viewed, we return to the same conclusion, that such a law as that would result in continual confusion, conflict and chaos, by which the safety of the people and the prosperity of this City would be menaced.

Undoubtedly, the sovereign state that possesses full and ample police power over all utilities within its borders

has seen fit to delegate exclusive police powers over public streets and public places within this City to the City Council, a creature of the sovereign, while the same sovereign has seen fit to delegate other police powers to another of its creatures, the Public Service Commission, i. e., the regulation, supervision and control of the railroads and other statewide utilities.

Section 8 of the City Charter provides that:

"The Commission Council shall also have power to order the ditching, filling, opening, widening and paving of the public streets and to regulate the grade therefor, and by two-thirds vote to sell or change the destination of any street."

Furthermore, the decision of the Louisiana Supreme Court above referred to relates to the case of a public road which was one of the main traffic lines of the State highway system outside of any urban community and in a rural section of the western portion of the State. In the words of the report of this case (151 La. 637, 92 South. 143):

"The crossing in question is on the main trunk line of the De Ridder-Lake Charles highway, now under construction. This road is one of the most important under way, and ultimately, on the completion of the various units now being built, will be the main north and south highway of the western part of the state, connecting Lake Charles and Shreveport.

"The plans of the state highway department, under whose jurisdiction and control the road is being built, call for an overhead crossing at the point where this road intersects the line of the defendant. The road is being built with federal aid, and it is shown by the testimony that this aid was

only available on the condition that an overhead crossing be constructed at this point. The testimony also shows that for some distance this road parallels the line of defendant and crosses the tracks at or near a point where the tracks emerge from a deep cut, the character of this cut being such that trains are not visible, except under favored conditions, from any point on the road until vehicular traffic is either on or so near the crossing as to render the situation hazardous."

Here the danger to be avoided related as much to the safety of the *service* furnished by the railroad company as to the safety of travellers using the highway—a quite different situation from that presented by the instant case, where the viaduct serves and was intended to serve merely as a means of opening a way across the property of the railroad company at a point where no street or way had ever before been opened or even laid out across it.

In view of the facts above recited, and also perhaps in view of the necessity of providing this overhead crossing in order to obtain the proffered federal aid, the Louisiana Supreme Court held that the Louisiana Public Service Commission had the power to compel the railroad company to build the overhead crossing in question. The court was careful, however, to guard against its decision being construed as recognizing that the powers of the Public Service Commission extended to the control and regulation of public highways, even in rural districts, for it said:

"Nor do we believe that the Act of 1918 and the order adopted by the Commission*****in regard to the public crossing over the tracks of plaintiff, is an attempt to exercise control or regulation of pub-

lic highways, by the Commission. It is, on the contrary, the exercise of control and regulation over the railroad company, as intended by section 4 of article 6 of the Constitution, in its relations with the general public represented by the police jury of Beauregard parish and the State Highway Commission."

Be this, however, as it may, the Louisiana constitution itself, as we have before shown, has declared that none of its provisions shall affect or take away from the city of New Orleans and other municipalities in Louisiana whatever powers they had over local public utilities; and there can be little doubt that the viaduct here in question (which the city caused to be constructed for the sole purpose of extending a public street across private property, without actually converting the ground at said crossing into a roadway), is a *local public utility, municipally owned*. As before said, the viaduct itself is a street or highway carried, by agreement with the railroad company, over land owned by the company and with respect to which the city and public have as yet acquired no right to use it as a grade crossing.

It is quite clear that it was not intended by the framers of the constitution to confer jurisdiction and authority upon the Public Service Commission to regulate and enforce the performance of the duties of such companies in all their various relations with the public, but that its jurisdiction was intended to be limited to matters pertaining to the performance of their public duties relating to the transportation of persons and property and all dealings and intercourse that have any bearing upon or in any way relate to such transportation.

It will be noted that while the first paragraph of section 4 gives the Commission unqualified authority to supervise, govern, regulate and control all common carrier railroads, nevertheless the second paragraph of said section defines this general grant of power by providing that it shall affect and include all matters and things connected with, concerning, and growing out of *the service* to be given or rendered by common carriers and other public utilities. It is clear from this language that the powers of the Commission extend only to matters and things concerning the *service* to be given by the railroad company, that is to say, to the transportation of persons or property. If the viaduct here in question were in any way connected with the transportation of persons or property by the railroad company—if, for instance, it were a viaduct over which the tracks of the railroad company were operated—it would be a thing connected with the service given by the railroad, and the Public Service Commission might have jurisdiction.

Or, if the viaduct were used as an approach to an office warehouse, track or other facility of the railroad company, it would likewise be related to the service rendered by the company, and the Public Service Commission might have jurisdiction.

But, on the other hand, it is clear that the constitutional grant of power to the railroad commission does not vest in that body the power to regulate and enforce the performance of the duties of railroad companies in *all* of their various relations with the public, and that its jurisdiction does not extend to matters pertaining to the performance of public duties having no relation to the service to be rendered by the railroads.

The complaint filed with the commission by the citizens of Algiers, considered in connection with the evidence introduced at the hearing, makes it clear that the primary purpose of the order was to require the repair of the viaduct at Newton Street for the benefit of the public who travel over said viaduct and not for the benefit of the public who travel on said railroad under that viaduct. It did not in any way pertain to the transportation of persons and property by the railroad company; neither was it necessary for the use of the public in transacting business with the railroad company.

That the commission has no jurisdiction, except such as expressly or by necessary implication is conferred upon it by the constitution, must be admitted, and care should be taken not to enlarge or diminish the jurisdiction which is conferred. (*State vs. Jackson Terminal Co.*, 71 So. 474; *Atlantic Coast Line R. Co vs. State*, 74 So. 595; *City of Red Bluff vs. Sou. Pac. Co.*, 187 P. 152). However, under a strict construction, the conclusion is inevitable that the powers conferred upon the Public Service Commission with respect to railroads relates solely to the transportation of persons and other property, or to such intercourse and dealings of the public with the railroad companies as are in some way connected with transportation.

We doubt if it would be the part of wisdom to extend the jurisdiction of the Public Service Commission over matters wholly disconnected from the business of transportation. If the jurisdiction of the commission were expressly extended by legislative declaration to matters such as the one concerned in this case, it might not be an unwise thing to do; but if such power or jurisdiction to deal with this particular subject matter be implied by

interpretation construction, then it must naturally be conceded to exist in all matters pertaining to the performance by railroad companies of their public duties, regardless as to how far removed from the business of transportation the performance of such public duty may be. In other words, every requirement made of such company by law and in every instance where the exercise of power may be forbidden by law, it would devolve upon the Commission to require obedience to such demands of the law, whether it be acts of commission or omission. Under the law, it is a public duty of railroad companies to pay their taxes; and it would be just as reasonable to construe the grant of power in the section of the constitution above quoted as extending to the enforcement of this public duty.

It is admitted that a viaduct at Newton Street is needed for the use, safety and convenience of the public; and the city joins with the Public Service Commission in its contention that it is a public duty of the railroad company to construct, maintain and repair this viaduct for the convenience and safety of the people of the city. Moreover, the power to compel the railroad company to construct, maintain or repair the viaduct comes squarely within the police power of the state. If this power has not been specifically granted to some officer or board authorizing the requirement of this public duty, when desired and found necessary by and for the people in any community, the people certainly have the power, and acting through the Legislature may exercise it at will, subject only to federal or state constitutional restrictions. (*State ex rel. Minneapolis vs. St. Paul, M. & M. R. Co.*, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, *id.* 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698, and authorities cited.)

The only question is, Where has the power been lodged, if at all, and where should it be exercised? It seems that this power should be exercised in such a manner that there will be as little confusion as possible, and without any conflict of jurisdiction. The enforcement of the performance of all public duties by railroad companies pertaining to the business of transportation can be seen at a glance, by reason of not being confined to any particular locality, but general in its nature, and should be lodged exclusively in the Public Service Commission. But, on the other hand, the performance of all such public duties, such as construction and maintenance of a viaduct in order to extend an unopened street across the land or right of way at a railroad, where it relates in no way to the transportation of persons or property, and is not necessary to be used by the public in dealing with the railway, should be left in the hands of local authorities. The people in each community know their needs best; they know better when such improvements should be made, and the character necessary to reasonably and conveniently meet their wants; they are in a position to expeditiously enforce the performance of this public duty.

The reasoning and philosophy which we urge upon the court has heretofore been applied in several recorded cases.

In the case of *A. T. & S. F. Railway Company vs. Corporation Commission of State of Oklahoma*, 170 Pac., 1156, the Oklahoma constitution gave the Corporation Commission of Oklahoma the power "of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their

charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies"; and to that end was also given power from time to time to "prescribe and enforce against such companies, in the manner hereinafter authorized, rates, charges, classifications of traffic and rules and regulations", and to require them "to establish and maintain all such public service, facilities and conveniences as may be reasonable and just."

In this case the Attorney General filed a complaint before the Corporation Commission charging that the railway company operated a line along and across certain streets in the city of Guthrie and refused to maintain a safe and suitable crossing where its tracks crossed said streets, thereby endangering the safety of the traveling public in using said streets. The Oklahoma Supreme Court said that the Corporation Commission had no jurisdiction except such as expressly or by necessary implication was conferred upon it by the constitution; and that it was quite clear that the framers of the constitution did not intend to confer jurisdiction upon the Corporation Commission to regulate and enforce all the public duties of railroad companies, but that its authority was intended to be limited to matters pertaining to the performance and public duties relating to the transportation of persons and property and all dealings and intercourse that have any bearing upon or in any way relate to such transportation.

A case very similar to the one at bar is *People ex rel. New York, etc. R. R. Company vs. Willcox*, 94 N. E. 212, 200 N. Y. 423. Complaint was made to the Public Service Commission of New York that the N. Y. N. H. & H. Railroad Company maintained and loaded its manure cars in its Harlem River Yards in an unsanitary and offensive

manner in violation of the sanitary code of the Department of Health. The court notices that the complaint related not to the inconvenience or discomfort of the company's passengers, nor to any other portion of its road than that within the city of New York. The railroad company moved to dismiss the complaint on the ground that the matter was one for the Board of Health and not within the jurisdiction of the Public Service Commission.

Under the New York law, the Public Service Commission had general supervision of all common carriers, with power to examine the same and keep informed as to their general condition and the manner in which their lines were managed, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with all the provisions of law, orders of the commission and charter requirements. The New York Court of Appeals said:

"Broad as are the powers conferred by the act, they are, by plain intendment, as I read them, such as are directed, exclusively, to the amplest supervision and regulation of railroad corporations, equipment, terminal facilities and operations in the transportation of persons and property. The exercise of the powers is intended to be when rendered necessary, in the judgment of the commissions, by reason of the unjust, unsafe, or inadequate, regulations, practices, equipment, appliances, or service. 'in respect to the transportation of persons, freight, or property.' The object of the legislature, as fairly to be deduced from its enactment, was to regulate the management and the operations of common carriers, within the state, in the interest of the public, that is, of the persons who should use the facilities for the transportation of themselves, or of their

property, who should serve them; or who should be interested in them, as holders of their capital stock, or obligations. The commissions were given extensive powers; but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits, when directed against the management, or the operations, of railroads, and the commissions cannot enforce a provision of law, unless the authority to do so can be found in the statute. (See *Village of Fort Edward vs. Hudson Valley Ry. Co.*, 192 N. Y. 139; *People ex rel. South Shore Traction Co. vs. Willcox*, 196 ib. 212; *People ex rel. D. & H. Co. vs. Stevens*, 197 ib. 1.) Nor should they reach out for dominion over matters not clearly within the statute.*****

"When we consider the order, now, in question, we find it has no pertinence, except as it is directed to the abatement of a nuisance, complained of as affecting the health and comfort of the locality, where is situated the terminal freight yard of the relator. As that locality is within the territorial jurisdiction of the municipal department of health of the city of New York, the question is, whether the court shall say that that jurisdiction has been shorn of the power to act as against a railroad corporation. If it cannot be said that the Public Service Commissions Law was intended to furnish the only law upon the subject, it cannot be deemed to deprive the local board of health of the jurisdiction to act in matters concerning the health of the community.*****With statutory provisions existing, general and special, it should not be presumed that the legislature intended to interfere with these administrative departments of municipalities, in the absence of unmistakable language. I believe it to be a fundamental concept of our form of government, that in the local subdivisions of the state, the

people of the locality shall administer their own local affairs, to the extent not restricted by some consitutional provision. I concede the right of the legislative body to regulate the acts of local officers. I concede the interest in the public health of the whole state to be such as to justify an exercise of the legislative power to regulate administrative functions in that respect, which have been committed to local jurisdictions; but it does not follow that officers acting under the appointment of the state executive and the senate should, also, be authorized to perform the local functions of a board of health. There is no pretense, either, of a state policy, or of the existence of local abuses, which would justify interference by the state with this administrative department of the city government, and what other reasonable, or politic, ground is there for implying an intent to interfere? The legislative, in creating the public service commissions, had in contemplation a general system for the supervision and the regulation of common carriers within the state; which should promote efficiency in management, operations conducive to the comfort and safety of passengers and employees, and an equipment and facilities adequate and proper for the transportation of persons and property. Boards of Health existed to act locally and exclusively for the protection of the health of municipalities. No intent to interfere with matters committed to their jurisdiction is clear from the language of the act and none should be implied. Powers, differing as the objects proposed to be attained differed, were vested in the two bodies. In their several spheres of action, each body had its peculiar and special functions, with machinery supposed to be adequate to reach the evils aimed at and to enforce its mandates for their cure. To hold that they could act concurrently, not

only would be without justification in the scheme of this statute; it would permit of a clash of authority and an acute situation might arise, as Mr. Justice Scott observed in dissenting below.

"Those views lead me to the conclusion that the public service commission was without jurisdiction to entertain the complaint and to make the order in question."

The New York case above quoted at length was followed in *City of Syracuse vs. N. Y. Street Railways*, 189 N. Y. S. 763.

Finally, we note *Atlantic Coast Line Railroad Company vs. State*, 74 South 595, where the court held that railroad commissions can exercise only such authority as has been legally conferred by express provisions of law or such as by fair intendment is incident thereto and any reasonable doubt of any particular power is to be resolved against their exercise of it.

We, therefore, submit that the jurisdiction of the Louisiana Public Service Commission has no relation to a viaduct constructed by municipal corporations for the purpose of extending a street across the private property of a railroad, for the convenience of the general public, and that said Commission has no power to order the railroad company whose land is crossed by such a viaduct to maintain the viaduct and keep it in repair.

Respectfully submitted,

IVY G. KITTREDGE,

City Attorney for the City of New Orleans.

Feb. 14, 1924.

LOUISIANA PUBLIC SERVICE COMMISSION,
ET AL. *v.* MORGAN'S LOUISIANA & TEXAS
RAILROAD & STEAMSHIP COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 421. Argued March 5, 6, 1924.—Decided April 7, 1924.

1. Under the Louisiana Constitution of 1921, Art. XIV, § 22, the general control of its own streets is an ordinary governmental function of the City of New Orleans. P. 399.
2. The Louisiana Constitution of 1921 did not invest the State Public Service Commission with such control over streets within

New Orleans that it may compel a railroad company to repair and keep up a street viaduct constructed over its tracks by the city under a contract which granted that right to the city without expropriation or compensation upon the express condition that the city should pay the cost of the erection and subsequent maintenance of the viaduct. P. 399.

287 Fed. 390, affirmed.

APPEAL from a decree of the District Court enjoining the appellants from enforcing an order requiring the appellee railroad company (plaintiff below) to repair a viaduct over its tracks.

Mr. W. M. Barrow, with whom *Mr. A. V. Coco*, Attorney General of the State of Louisiana, was on the brief, for appellants.

Mr. Henry H. Chaffe, with whom *Mr. George Denegre*, *Mr. Victor Leovy*, *Mr. Harry McCall* and *Mr. Jas. Hy. Bruns* were on the brief, for appellee.

Mr. Ivy G. Kittredge, by leave of Court, filed a brief on behalf of the City of New Orleans, as *amicus curiae*, asserting its jurisdiction over the subject matter in question.

Mr. JUSTICE McREYNOLDS delivered the opinion of the Court.

March 29, 1923, the appellant Commission issued an order which directed—

“That within fifteen days from the date of this order the Morgan’s Louisiana and Texas Railroad and Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan’s Louisiana and Texas Railroad and Steamship Company in the Fifth Municipal

District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once."

By an original bill filed in the court below appellee challenged the validity of the order because beyond the power of the Commission; and, if within such power, enforcement would deprive the Company of property without due process of law and impair the obligation of its contract with the City of New Orleans, contrary to the Federal Constitution. The allegations are sufficient to bring the controversy within the court's jurisdiction and empowered it to determine questions of both state and federal law. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. A special court of three judges, Jud. Code, § 266, heard the issues, held the Commission lacked power to make the order and directed an interlocutory injunction. See 287 Fed. 390. The cause is here by direct appeal.

In 1878 the appellee Railroad Company acquired title to certain land now in New Orleans, fronting 375 feet on the Mississippi River and extending back 4,000 feet, and for forty years has held it under fence. Twenty tracks laid thereon are in constant use. During 1904 the City offered to sell the right to operate a street railway over this property, subject to part payment of the cost of constructing and the entire cost of maintaining the essential viaduct, which the City agreed to provide. This franchise was duly adjudicated, and in 1905 appellee, by definite contract, granted to the City the right to construct the present viaduct over its property at Newton Street, upon the express condition that the grantee should pay for both erection and subsequent maintenance. Under this contract, and not otherwise, without expropriation of the right of way by the public or compensation to the land

owner, the structure was erected. It is 2,000 feet long and extends several hundred feet on either side of appellee's land. For many years the street railway operated over its entire length. Finally, the portion over appellee's tracks fell into disrepair and both City and street railway company failed to restore it. Finding this situation, appellant issued the order copied above.

Art. VI, Louisiana Constitution of 1921 provides—

"Section 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads . . . and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. . . ."

"Section 9. Until otherwise provided by the Legislature, all laws enacted by the General Assembly of the State of Louisiana since the adoption of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, concerning, or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

The Commission claims that the power which it undertook to exercise is conferred by these sections and that the Supreme Court of the State so held in *Gulf, C. & S. F.*

Ry. Co. v. Louisiana Public Service Commission, 151 La. 635.

The court below entertained another view of the constitutional grant and of the opinion relied upon. We think the conclusion which it reached is correct; and its decree must be affirmed.

Article 284, Louisiana Constitutions of 1898 and 1913—

"The power and authority is hereby vested in the Commission [Railroad, Express, Telephone, Telegraph, Steamboat and other Water Craft, and Sleeping Car Commission, created by Art. 283], and it is hereby made its duty to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, steamboats and other water craft, sleeping car, express, telephone and telegraph lines of this State, and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance over the same line, unless authorized by the Commission to do so in special cases; to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations, and to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction. . . ."

By Act 132 of 1918 the General Assembly of Louisiana directed "that the powers and duties of the Railroad

Commission of Louisiana are hereby added to and enlarged; and the power and authority is hereby vested in the said Commission, and it is hereby made its duty to require the owner, possessor or operator of any railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, crossing any public road already constructed or which may hereafter be constructed, to construct and maintain a suitable and convenient crossing over such public road, the said crossing to extend to the limits of the right of way, or fifty feet from the center of such railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers in respect to such crossings." The act further empowered the Railroad Commission to require such crossings upon proper certificates of the police juries in the respective parishes.

The broad language of Art. 284, Constitutions of 1898 and 1913, was not regarded as sufficient to empower the Railroad Commission to require carriers to construct public crossings over their lines. To meet this situation and provide relief in the parishes the Act of 1918 was passed; and it was an order issued under this act which the Supreme Court sustained in *Gulf, C. & S. F. Ry. Co. v. Louisiana Public Service Commission*.

Art. XIV, § 22, Louisiana Constitution of 1921—

"The electors of the City of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose their public officers. This section shall not prohibit . . . nor shall it be construed as restricting the police power of the State, or as prohibiting the Legislature from appointing, or authorizing the appointment of, any board or commission with full au-

thority in the City of New Orleans other than that of controlling the ordinary governmental functions of municipal government."

Unless and until otherwise advised by the Supreme Court of Louisiana, we must conclude that the general control of its own streets is an ordinary governmental function of the City of New Orleans.

It would require more definite language than we find in the Constitution of 1921 or in *Gulf, C. & S. F. Ry. Co. v. Louisiana Public Service Commission* to convince us that the Commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the Commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that the State had undertaken to authorize a thing so manifestly unjust and oppressive.

Affirmed.